MISSISSIPPI LAW JOURNAL

ARTICLES

THE ORIGINAL UNDERSTANDING OF THE FREEDOM OF THE PRESS PROVISION OF THE FIRST AMENDMENT

Philip B. Kurland

AN ANALYSIS OF MISSISSIPPI'S TREATMENT OF FOREIGN CORPORATIONS

Felicia Dunn-Cooper

COMMENTS

Ake v. Oklahoma: AN INTERLOPER IN THE BRAVE NEW WORLD OF THE 1984 INSANITY DEFENSE REFORM ACT CHALLENGES FEDERAL RULE OF EVIDENCE 704(b)

RATIONAL BASIS REVIEW UNDER THE EQUAL PROTECTION CLAUSE—A DOUBLE STANDARD REVIEW—*City of Cleburne, Texas v. Cleburne Living Center*

VOLUME 55 JUNE 1985 NUMBER 2

RECENT DECISIONS OF THE MISSISSIPPI SUPREME COURT

Keep your office informed with a subscription to the *Mississippi Law Journal* briefs of decisions of the Mississippi Supreme Court.

Briefs are written by *Journal* members and mailed by Tuesday of the week after the decisions are rendered, several weeks before cases are printed in the regional reporter. You can receive this weekly publication and be up to date for only $25.00 per year—an indispensable service! Subscribe now, or write for a free sample of the most current briefs.

Mississippi Law Journal
P. O. Box 849
University, Mississippi 38677

A Retirement Plan should be designed for the needs of the company or individual it serves.

We now offer the latest I.R.S. approved prototypes that can be adapted to each of your clients specific individual objectives whether a new plan or an existing one.

- **Money Purchase**
- **Profit Sharing**
- **Thrift Plans**
- **Defined Benefit**
- **Keoghs**
- **I.R.A. Rollovers**

OPTIONS
Investment Management - Split funded - Individual
Asset Selection - Intergrated-Non-Intergrated -
and More

The Trust Division
DEPOSIT GUARANTY
NATIONAL BANK Member F.D.I.C.

Grow with Us

COLUMBUS CLAIMED THE NEW WORLD

AND THOUGHT THAT WAS ENOUGH!

When Columbus landed, he planted a flag, made a speech, looked around, then sailed back to Spain. If he'd known about title insurance, we'd all be speaking Spanish now.

A simple claim isn't enough. With title insurance from Mississippi Valley Title, your clients are assured of clear ownership and title protection. That's why people all over the land Columbus lost choose Mississippi Valley Title for their title insurance needs.

Title insurance from Mississippi Valley Title.
It can make a world of difference.

Mississippi Valley Title Insurance Company
Home Office, Jackson, MS 39205
Wholly owned subsidiary of Title Insurance Company of Minnesota

ANNOUNCEMENT

We have purchased the
entire back stock and
reprint rights of —

MISSISSIPPI LAW JOURNAL

Complete sets to date
are now available. We
can also furnish single
volumes and issues.

Volumes 1-54 (1928-1984) newly bound $1890.00
per volume newly bound $37.50

FRED B. ROTHMAN & CO.
10368 W. Centennial Rd.
Littleton, Colorado 80123

The *Mississippi Law Journal* is published four times annually in March, June, September, and December. Editorial and business offices: *Mississippi Law Journal*, Post Office Box 849, University, Mississippi 38677.

Current subscription: $18.00 per year. Single issue: $5.00. Subscriptions are renewed automatically upon expiration unless the subscriber sends notice of termination.

Change of address: Send address changes directly to the *Mississippi Law Journal.* Include name, new address (including zip code), and old address. Please notify 45 days in advance to ensure prompt delivery.

Unless a claim is made for nonreceipt of *Journal* issues within 6 months after the mailing date, the *Mississippi Law Journal* cannot be held responsible for supplying those issues without charge.

Second class postage paid at University, Mississippi 38677 and additional mailing offices.

Citations conform to A Uniform System of Citation (13th ed. 1981).

The *Mississippi Law Journal* is a member of the National Conference of Law Reviews.

To offer its contributors complete freedom, the *Journal* assumes no responsibility for the views expressed herein.

Digitized by the Internet Archive
in 2012 with funding from
LYRASIS Members and Sloan Foundation

http://archive.org/details/mississippilawjo55phil

Mississippi Law Journal

Published by Students at the University of Mississippi School of Law

VOLUME 55 JUNE 1985 NUMBER 2

Copyright © 1985, Mississippi Law Journal

TABLE OF CONTENTS

ARTICLES

The Original Understanding of the Freedom of the Press Provision of the First Amendment ..... *Philip B. Kurland* 225

An Analysis of Mississippi's Treatment of Foreign Corporations ..... *Felicia Dunn-Cooper* 259

COMMENTS

Ake v. Oklahoma: An Interloper in the Brave New World of the 1984 Insanity Defense Reform Act Challenges Federal Rule of Evidence 704(b) 287

Rational Basis Review Under the Equal Protection Clause—A Double Standard Review—*City of Cleburne, Texas v. Cleburne Living Center* 329

RECENT DECISIONS

Constitutional Law—Criminal Procedure—Due Process Clause of the Fourteenth Amendment Guarantees the Effective Assistance of Counsel on a First Appeal as a Matter of Right 359

Torts—Misrepresentation—Mississippi's Path from Fraud and Scienter to Negligent Misrepresentation 375

Constitutional Law—Juries—Racially Discriminatory Use of Peremptory Challenges Violates the Sixth Amendment Guarantee of Trial by an Impartial Jury 389

Corporations—Products Liability—Expansion of Successor Corporation Liability Through the Continuity of Enterprise Theory 413

THE ORIGINAL UNDERSTANDING OF THE FREEDOM OF THE PRESS PROVISION OF THE FIRST AMENDMENT*

*Philip B. Kurland***

I. The Constitution, Like the Common Law, Is Based on Experience

One of the most quoted phrases in legal literature is Oliver Wendell Holmes's proposition that "The life of the law has not been logic: it has been experience."[1] Like many of Holmes's well-known aphorisms, it is usually quoted out of context. He was not saying, as some would have it, that law reflects only feelings or ideology rather than reason.[2] He was rejecting the rigidity of the syllogism, which tells us how to derive a conclusion from a major and minor premise, but tells us not how to discover those premises. There are always more than major and minor premises in-

---

* Copyright 1984 by Philip B. Kurland.

This article was originally presented as the Tenth Annual Law Memorial Lecture at the University of Mississippi School of Law in March of 1984. Since 1974, the Law Memorial Lectures have been supported by the Jackson, Mississippi firm of Butler, Snow, O'Mara, Stevens & Cannada, as a memorial to founding members of the firm, George H. Butler, Sr., Charles B. Snow, and J. Morgan Stevens. Professor Kurland inaugurated the series in 1974 with *Watergate, Impeachment and the Constitution*, 45 Miss. L.J. 531 (1974).

** William R. Kenan, Jr., Distinguished Service Professor, University of Chicago Law School. A.B. 1942, University of Pennsylvania; L.L.B., 1944, Harvard University; L.L.D., 1977, University of Notre Dame. A former president of the Harvard Law Review, Professor Kurland was law clerk to Judge Jerome N. Frank of the United States Court of Appeals for the Second Circuit and Justice Felix Frankfurter of the United States Supreme Court. He has written widely on constitutional issues, and his books include Watergate and the Constitution (1978), Politics, The Constitution, and The Warren Court (1970), and Felix Frankfurter on the Supreme Court (1970).

[1] O.W. Holmes, The Common Law 1 (1938).

[2] "These philosophers believe that they have burrowed too far into the visceral origins of our beliefs and of all convictions to be fobbed off by the ingenuous assumptions of a simpler age." L. Hand, The Spirit of Liberty 207 (2d ed. rev. 1953).

volved in the framing of law. As Holmes said on that same first page of *The Common Law*, "other tools are needed besides logic . . . . The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have a good deal more to do than the syllogism in determining the rules by which men should be governed."[3] And, he went on: "The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become."[4] A knowledge of its history and origins, of what Alexander Bickel once called "the original understanding,"[5] is a necessary ingredient in comprehending our present law. The "original understanding" of the first amendment has generally been romanticized to the end of commanding the broadest reading of the provision in its application to today's problems.[6] By revealing its history, however, I make no claim or assertion that it will afford solutions to our modern difficulties. History is but one element in the elucidation of the law, and usually not the most important one.

Holmes, in his famous epigram about the life of the law, was, of course, speaking about the development of the common law, a body of rules wholly created by judges in the course of adjudicating cases and controversies, usually between private parties. The materials of judicial precedents, unalloyed by constitutional mandate or statutory command, are particularly mal-

---

[3] HOLMES, *supra* note 1, at 1.

[4] *Id.*

[5] *See* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

[6] The point of view described here is inextricably linked to the name of Justice Black, whose view of the first amendment is illustrated by the following representative statement: "It is my belief that there *are* 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be 'absolutes.'" Black, *The Bill of Rights*, 35 N.Y. UNIV. L. REV. 865, 867 (1960). Among other commentaries discussing the amendment in similarly sweeping terms, see W.O. DOUGLAS, POINTS OF REBELLION 1-3, 11 (1970)(deploring narrow interpretation); and Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256-57 (1961)(amendment requires absolute immunity for all political speech).

leable. If law school teaches nothing else, it must demonstrate that precedents are not rigid limitations on judicial judgment and that the more relevant precedents there are, the less confining they tend to be. Judges relying solely on their predecessors' efforts from which to derive a governing rule infringe on no one else's domain when they utilize their own intellectual resources to shape received doctrine to fit the moods and needs of their own day. But, as Holmes also said, while judges do create new rules, i.e., they are legislators, "they can do so only interstitially; they are confined from molar to molecular motions."[7] And yet, even in the arena of the common law, where the judge is monarch of all he surveys, it still behooves him in determining the fitness of earlier decisions to understand the reasons for their creation and the stages of their growth. Let me use Holmes's words from *The Common Law* again:

> However much we may codify the law into a series of seemingly self-sufficient propositions, those propositions will be but a phase in a continuous growth. To understand their scope fully, to know how they will be dealt with by judges trained in that past which the law embodies, we must ourselves know something of the past. The history of what the law has been is necessary to the knowledge of what the law is.[8]

(To law students who may read these remarks, I feel it necessary to explain my iterated reliance on Holmes. But I have discovered that, as I grow older, Holmes seems to grow wiser. When I was a student, I cherished Holmes for his wit, for his aphorisms, for his brevity, and for his command of the English language, surpassed among judges, if at all, only by Learned Hand and the most able Supreme Court opinion writer of all time, Robert H. Jackson. But time has taught me that what once impressed me only as grand style was in fact a capacity for insights—Holmes called it, in his snobbish fashion, "apercus,"[9]—that lesser minds, such as mine, could come to appreciate only through experience.)

---

[7] Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917)(Holmes, J., dissenting).

[8] HOLMES, *supra* note 1, at 37.

[9] *See* M. LERNER, THE MIND AND FAITH OF JUSTICE HOLMES 419-20 (1946)(Holmes's use of the word to convey what he thought of Hegel's philosophy of law).

Let me remind you again that, in the quotations I have thus far offered, Holmes was talking about the common law, where the judges were the voices of the sovereign. At the risk of speaking heresy in today's world of constitutional jurisprudence, I would suggest that even federal judges, mighty as they are, have a more limited law-making power in cases involving constitutional or statutory construction. The differences may be hard to discern simply from a reading of judicial opinions. Using Holmes's dicta or their equivalent to excuse themselves from any obligation to reasoning, judges today frequently connect their answers to the questions only by untold numbers of words among which some selection might be made by their readers to find several different explanations—sometimes inconsistent ones. And usually the most important of these words are "I believe" or some equivalent Jovian expression of personal preference. Perhaps no more than such a personal credo should be required in a common-law case. But surely some obligation is owed to recognize constitutional provisions and statutory enactments as having greater weight than mere judicial precedents. If I am not lifting myself by my own bootstraps by referring to the Constitution itself, I would note that article VI makes the Constitution and the laws of the United States "the Supreme Law of the Land,"[10] without even a nod in the direction of prior judicial decisions. It took John Marshall in *Marbury v. Madison*[11] to provide the lever by which judicial dictum became superior to constitutional or statutory language: a lever utilized far more in the twentieth century then it was in the nineteenth. Marshall's phrase, of which the Supreme Court has become so enamored, was: "it is emphatically the province and duty of the judicial department to say what the law is."[12]

Of course, I do not mean to suggest that those of us who do not share the latitudinarian views of judicial authority represented by my deconstructionist colleagues would reject for constitutional adjudication Holmes's notions of how law is made. The syllogism is still an inadequate guide, even if one were to

---

[10] U.S. CONST. art. VI, § 2.

[11] 5 U.S. (1 Cranch) 137 (1803).

[12] *Id.* at 177.

find his major premise in the legislative language. The context in which it was composed, the problems to which it was addressed, and the ambiguities of language still call for the kinds of judgments that a common-law judge is called on to make, and more. Neither the syllogism nor a computer can provide a definitive answer. Judgment is invoked and judgment is a human function, not a mechanical one.

Felix Frankfurter, then a justice of fifteen years experience, once described, for the benefit of the American Philosophical Society, the demands on a judge whose principle business was constitutional and statutory construction. He wrote:

> A judge whose preoccupation is with such matters should be compounded of the faculties that are demanded of the historian and the philosopher and the prophet. The last demand upon him—to make some forecast of the consequences of his action—is perhaps the heaviest. To pierce the curtain of the future, to give shape and visage to mysteries still in the womb of time, is the gift of imagination. It requires poetic sensibilities with which judges are rarely endowed and which their education does not normally develop. These judges, you will infer, must have something of the creative artist in them; they must have antennae registering feeling and judgment beyond logical, let alone quantitative, proof.
>
> The decisions in the cases that really give trouble rest on judgment, and judgment derives from the totality of a man's nature and experience. Such judgment will be exercised by two types of men, broadly speaking, but of course with varying emphasis—those who express their private views or revelations, deeming them, if not *vox dei*, at least *vox populi*; or those who feel strongly that they have no authority to promulgate law by their merely personal view and whose whole training and proved performance substantially insure that their conclusions reflect understanding of, and due regard for, law as the expression of the views and feelings that may fairly be deemed representative of the community as a continuing society.[13]

If the Constitution is not a code of laws with a rule to meet every contingency, neither is it merely a set of moral precepts

---

[13] Frankfurter, *Some Observations on the Nature of the Judicial Process of Supreme Court Litigation*, 98 PROC. OF THE AM. PHIL. SOC'Y 233, 237 (1954).

derived from the political philosophers whom the writers and ratifiers of the Constitution invoked so frequently in their arguments over the merits and demerits of various provisions. The Constitution was not, in 1787, a recapitulation of John Locke or Baron Montesquieu, any more than in 1904 it could be derived from Herbert Spencer's *Social Statics*[14] or in the 1970's from John Rawl's *Theory of Justice*,[15] so that one cannot simply resort to the writings of such savants to determine its meaning. As Felix Frankfurter once said when he was still professing law, "the Constitution . . . was a response to the practical problems and controversies of our early history."[16] While it is not sufficient to know what those "practical problems and controversies" were in order to determine the meaning of the words that were used, such knowledge can shed some light on how the terms are to be applied even today. For some, like Mr. Justice Black, "it is language and history that are crucial factors which influence me in interpreting the Constitution—not reasonableness or desirability as determined by justices of the Supreme Court."[17]

Thus, the Constitution can be seen to have been created largely to resolve two kinds of problems with which the statesmen of the time had more than adequate experience. The first was the set of abuses imposed on the American colonists and their antecedents by royal governments. Many of these may be found detailed in the bill of indictment contained in the Declaration of Independence. I do not mean Jefferson's sonorous phrases about "self-evident truths." (As law students learn

---

[14] H. SPENCER, SOCIAL STATICS (1851). This book may now be better known to law students than to the general public, thanks to Holmes's famous statement that the fourteenth amendment did not enact it. *See* Lochner v. New York, 198 U.S. 45, 75 (1905)(Holmes, J., dissenting). But in the late nineteenth and early twentieth centuries, Spencer's argument against state economic regulation enjoyed tremendous popularity. Discussions of his influence appear in S. FINE, LAISSEZ-FAIRE AND THE GENERAL WELFARE STATE 30-46 (1956); R. HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT *passim*, esp. 31-50 (1955); and 3 V.L. PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT 197-211 (1927).

[15] J. RAWLS, A THEORY OF JUSTICE (1971). Rawls attempts to use the time-honored notion of the social contract to support his vision of a society striving to enhance the position of the materially disadvantaged, subject to provisions guaranteeing "equal liberty" for all citizens.

[16] F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 6 (1928).

[17] H. BLACK, A CONSTITUTIONAL FAITH 8 (1968).

quickly, when a brief or an opinion suggests that a proposition needs no authority to support it, it usually means that there is no such authority.) I speak rather of the specific complaints about such things as trial beyond the vicinage and a judiciary beholden to the executive.[18] The second set of experiences which engaged the framers in a search for cures were the defects in the government established under the Articles of Confederation, not least of which was the incapacity of the central government to raise funds and to protect commerce among the several states. The first problems were those of government too strong to preserve the liberties of the people. The second were those of a government too weak to survive. A way had to be found between Scylla and Charybdis.

Nor were the answers devised by the Constitution writers ad hoc innovative solutions to perceived problems. Between 1776 and 1787, and even before, the states had experienced self-government of their own, affording examples of how best to deal with some of the basic issues that confronted the Founding Fathers. An examination of the state charters and constitutions demonstrates that a very large part of the American Constitution was derivative rather than original, not least in the area of the Bill of Rights. For example, even before the Declaration of Independence, the Virginia Bill of Rights asserted that "the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments."[19] The founders did not need to imagine the dangers of allowing the quartering of troops in private homes. They did not need to guess at the necessity for a rein on the judiciary through a guaranty of jury trial. Whether true of the common law or not, certainly the creation of the Constitution was based on experience rather than logic.

---

[18] The Second Continental Congress's catalogue of grievances against George III contains, inter alia, charges that he "made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries," and that he consented to laws providing for "transporting us beyond seas to be tried for pretended offenses . . . ." The Declaration of Independence, para. 11, 21.

[19] Virginia Bill of Rights, § 12 (June 12, 1776), *reprinted in* 1 H.S. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 103-04 (9th ed. 1973).

II. American Preconstitutional Experience: The Blackstonian Concept of the Freedom of the Press

The Constitution was the capstone of a unique political revolution. The American Revolution was not a contest between rival political or religious factions seeking hegemony over the people. Nor was it a contest between economic classes or social strata, for the American states were—if we ignore the question of slavery, which is exactly what the Founding Fathers did—still essentially classless societies. It was a revolution to bring about self-government in a geographic area of a dimension never before the subject of democratic or republican rule, self-government that would afford its constituents protection for life, liberty, and property and perhaps, even for the Jeffersonian notion of "the pursuit of happiness." But, as one of the patron saints of the new American Government, John Locke had written: "The business of law is not to provide for the truth of opinion, but for the safety and security of the commonwealth and of every particular man's goods and person."[20] The restoration of the rights of Englishmen—including no taxation without representation—was the battle cry of the American Revolution of 1776. By the time the War of Independence was won, and certainly by 1787 when the Constitution was framed, the rights of Englishmen were probably not enough.

Among the pre-Revolutionary rights of Englishmen was what was termed "freedom of the press." Since there was no written constitution in England—there still is none—English freedom of the press was somewhat amorphous in nature and, in any event, subject to change at the will of Parliament. The nature of this right was described by David Hume in an essay of 1742, with all his usual enthusiasm for British liberty. In *Of the Liberty of the Press*, he wrote: "Nothing is more apt to surprise a foreigner, than the extreme liberty, which we enjoy in this country, of communicating whatever we please to the public, and of openly censuring every measure, entered into by the king or his ministers."[21] Hume saw no inconsistency between this

---

[20] J. Locke, A Letter Concerning Toleration 205 (C. Sherman ed. 1937).

[21] D. Hume, 1 Essays Moral, Political and Literary 94 (T. Green & T. Grose ed. 1907).

right of Englishmen and the "general laws against sedition and libeling [which] are at present as strong as they possibly can be made."[22] The theme was one that would recur throughout the eighteenth- and early nineteenth-century discussions of the subject: freedom to say what you will, but responsibility for what was said.[23] Is speech or press free when the speaker or publisher may be held liable in penal or civil sanctions for it? Certainly the English liberals of the day seem to have thought so.

A point then that should be quickly made is that the Americans were fully conversant with the English law when they were going about the business of their constitution-making. In this day and age, when lawyers are so ill used, even by such eminents as the Chief Justice of the United States[24] and the President of Harvard University,[25] both of whom are members of the profession, I am fond of resorting to Edmund Burke's speech,"On Conciliation with America," as evidence of the role of the law and lawyers in bringing liberty to this continent. There Burke told Parliament:

> Permit me, Sir, to add another circumstance in our colonies, which contributes no mean part towards the growth and effect of this untractable spirit. I mean their education. In no country perhaps in the world is the law so general a study. The profession itself is numerous and powerful; and in most provinces it takes the lead. The greater number of the deputies sent to the Congress were lawyers. But all who read, and most do read, endeavor to obtain some smattering in that science. I have been told by an eminent bookseller that in no branch of

---

[22] *Id.* at 98 n.1.

[23] *See, e.g.*, Rex v. Shipley, 4 Douglas 73, 170, 99 Eng. Rep. 774, 824 (K.B. 1784)(Mansfield, J.)("[t]he liberty of the press consists in printing without any previous license, subject to the consequences of law"). Lord Ellenborough was of the same mind a generation later: "The law of England is a law of liberty, and consistently with this liberty, we have not what is called an *imprimatur*; there is no such preliminary licence necessary. But, if a man publish a paper, he is exposed to the penal consequences." Rex. v. Cobbett, 29 How. St. Tr. 1, 49 (K.B. 1804).

[24] *See, e.g.*, Address by Chief Justice Burger, A.B.A. midyear meeting (Feb. 12, 1984), *printed in* 70 A.B.A. JOURNAL 62, 65 (Apr. 1984)(discussing deficiencies of American legal system).

[25] *See, e.g.*, Address by Derek C. Bok, Report to the Harvard Board of Overseers for 1981-82, *printed in* HARVARD MAGAZINE, May-June 1983, 38-45, 70-71 (discussing problems of American legal system and legal education).

> his business, after tracts of popular devotion, were so many as those on the law exported to the plantations. The colonists have now fallen into the way of printing them for their own use. I hear they have sold nearly as many of Blackstone's Commentaries in America as in England.[26]

What then was the Blackstonian description of freedom of the press? In the fourth volume of the *Commentaries*, published in 1769, he wrote:

> The liberty of the press is indeed essential to the nature of a free State; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press, but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundation of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or enquiry: liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects . . . .[27]

The American preconstitutional experience was not dissimilar to that of the English. Here, too, the writers and the courts treated the notion of freedom of the press as the right not to have expressions censored before publication. It was as well ac-

---

[26] E. BURKE, *Speech on Moving his Resolutions for Conciliation with the Colonies*, in 2 WRITINGS AND SPEECHES OF EDMUND BURKE 124-25 (1901).

[27] 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *152-53.

cepted—however much we have since sought to mythologize Cato's Letters and John Peter Zenger—that a free press did not preclude post-publication prosecutions. And this was true in states where constitutional provisions had been made to ensure freedom of the press as well as where the reliance was solely on the common law. Thus, as late as the year before the Congress offered the first amendment for ratification, 1788, the Supreme Court of Pennsylvania decided *Respublica v. Oswald.*[28] The Pennsylvania Constitution provided that "the freedom of the press shall not be restrained"[29] and "that the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of the government."[30] Nevertheless, the court ruled that "[t]he true liberty of the press is amply secured by permitting every man to publish his opinion; but it is due to the peace and dignity of society, to inquire into the motive of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity."[31]

James Wilson, one of the foremost legal scholars of his time, later to be a justice of the Supreme Court of the United States, had expressed the same views at the Pennsylvania ratifying convention on December 1, 1787, where he said:

> I presume it was not in the view of the honorable gentleman to say that there is no such a thing as a libel, or that the writers of such ought not to be punished. The idea of the liberty of the press is not carried so far as this in any country. What is meant by the liberty of the press is that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government, or

---

[28] 1 Dall. 319 (Pa. 1788).

[29] Pa. Const. of 1776, art. XII, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3083 (F. Thorpe ed. 1909) [hereinafter cited as Thorpe].

[30] Pa. Const. of 1776, § 35, *reprinted in* 5 Thorpe, *supra* note 29, at 3090.

[31] *Oswald*, 1 Dall. at 325.

the safety, character, and property of the individual.[32]

These and the other authorities to which I shall refer are not exhaustive but rather representative of the legal opinion of the era.

There was controversy in the United States, as in England, but not over the question whether freedom of the press foreclosed punishment for publication that could not be censored. The issues that were fiercely mooted were two: should the judge or the jury determine whether the words used constituted a libel, and could truth be introduced as a defense? Those questions were put to rest in England by Fox's Libel Act of 1791[33] in favor of jury adjudication, and in this country to the same result sometimes by judicial decision,[34] sometimes by constitution or statute, as the terms of the Sedition Act[35] law reveal.

When the first amendment was proposed to the states for ratification, it was against this background of accepted law. Further enlightment as to its meaning was not forthcoming from the First Congress by way of legislative history. The usual reliable sources for construing the original constitution—the debates at the Federal Convention and at the ratifying conventions, *The Federalist*[36] and the *Anti-Federalist Papers*[37]—all offer some commentary on freedom of press, but not much that is helpful. Hamilton's proposition in the eighty-fourth *Federalist* suggests that the various state constitutional provisions for a free press are meaningless and only afford aid and comfort to those who would prefer to read things into the Constitution rather than to derive meaning from it. He wrote:

What is the liberty of the press? Who can give it any definition

---

[32] 2 ELLIOT'S DEBATES 449 (1861 ed.).

[33] An Act to Remove Doubts Respecting the Functions of Juries in Cases of Libel, 1791, 32 Geo. 3, ch. 60.

[34] *See, e.g.*, Respublica v. Dennie, 4 Yeates 267, 271, 2 Am. Dec. 402, 406 (Pa. 1805)(jury shall determine whether publication constituted libel); State v. Lehre, 2 Brew. 446, 446, 4 Am. Dec. 596, 596 (D.C. 1811)(jury decides whether statement was libelous as well as fact questions concerning publication and truth).

[35] An Act for the Punishment of Certain Crimes against the United States, 1 Stat. 596 (1798)(expired 1801).

[36] THE FEDERALIST (Henry Cabot Lodge ed. 1888).

[37] THE COMPLETE ANTI-FEDERALIST (H. Storing ed. 1981).

> which would not leave the utmost latitude for evasion? I hold it to be impracticable, and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.[38]

Thomas Jefferson, on the other hand, when returning his comments on the proposed first amendment, expressed views more in keeping with the Blackstonian notion of the concept. "[T]he following alterations and additions would have pleased me," he wrote to Madison. "The people shall not be deprived of their right to speak, to write, or otherwise to publish anything but false facts affecting injuriously the life, liberty, property, or reputation of others or affecting the peace of the confederacy with foreign nations."[39] Surely this was less of a license than even Blackstone's definition would afford. If his federalist foes could have known of it when they were locked in battle with him over the Alien and Sedition Laws, how they would have thrown it in his face. But his proposed emendation had come too late to effect a change in the language of the amendment, even though it was to find some echoes in the law as it later developed.

Thus was the attitude toward the "liberty" of publishers at the time of promulgation of the first amendment forbidding Congress to make any law "abridging the freedom of the press." I have spoken only about freedom of the press, largely because it was freedom of press and not of speech that was the concern of the colonists and their heirs. Insofar as speech was a problem, it tended to be subsumed under the religious question, which is a different but not necessarily separable provision of the first amendment. I have not tried to parse the words used by the First Congress. For, as an erudite word-monger once wisely said: "The great difficulty for historians is to find out what a certain sentence really meant in a particular year. Nothing is as unstable as speech; misunderstanding of what an earlier generation really meant is so easy as to be almost inevitable."[40]

---

[38] THE FEDERALIST No. 84, at 537-38 (A. Hamilton)(Henry Cabot Lodge ed. 1888).

[39] Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), in 7 WRITINGS OF THOMAS JEFFERSON 450 (A. Lipscomb ed. 1904).

[40] BRYHER, DAYS OF MARS 51 (1972).

Rather, let us undertake a pragmatic exegesis of the meaning of "freedom of press" as explicated in the controversy over the Alien and Sedition Laws and what followed.

III. The Sedition Law Crisis: Press Freedom as an Issue

The great constitutional crisis of the Federalist period surrounded the Alien and Sedition Laws and was in part—if only in part—concerned with the meaning of the first amendment. The Sedition Act of July 14, 1798[41] was, indeed, of broad scope, providing:

> SEC. 2. That if any person shall write, print, utter, or publish . . . any false, scandalous and malicious writing . . . against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States . . . or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person being thereof convicted before any court of the United States having jurisdiction thereof shall be punished, ...[42]

The issues that had vexed the English and American courts in criminal libel cases, whether evidence of truth could be offered in defense and whether judge or jury were to determine whether the published language constituted a libel, were resolved in favor of defendants by section 3:

> That if any person shall be prosecuted under this act, for the writing or publishing any libel aforesaid, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence in his defence, the truth of the matter contained in the publication charged as a libel. And the jury who shall try the cause,

---

[41] An Act for the Punishment of Certain Crimes against the United States, 1 Stat. 596 (1798).

[42] *Id.* § 2.

> shall have the right to determine the law and the fact, under the direction of the court, as in other cases.[43]

That the Alien and Sedition Laws were purposeful political machinations by John Adams and his cohorts, aimed at the Jeffersonian press and the Republicans' francophile partisans cannot be gainsaid.[44] That the statute trampled civil liberties, few doubted. Whether the powers asserted went beyond what the Constitution allowed was a more difficult question. The reaction of the Jeffersonians was strong. The Kentucky[45] and Virginia[46] Resolutions, drafted respectively by Jefferson and Madison, asserted that there was no constitutional authority in Congress to enact these laws and that, as parties to the Constitution, the states had the right to reject laws that were inconsistent with the terms of the compact. These two states called on their sister states to join them in declaring the statutes ineffective and commanding the representatives in Congress to withdraw them. This was one of the three or four major crises in our history in which some of the states sought to assert rights as contracting parties to the Constitution. They all failed.[47] The 1787 Constitution was

---

[43] *Id.* § 3.

[44] For discussions of the historical context of the Alien and Sedition Laws, see J. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 26-32 (1951)(detailing Federalists' fear of Republican newspapers) and J.M. SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 11-13 (1956)(discussing Federalists' fear of "Jacobinism"). For the partisan application of the laws, see R. BUEL, SECURING THE REVOLUTION: IDEOLOGY IN AMERICAN POLITICS 1789-1815 235-36 (1972)(asserting that Federalist judges and officials used the laws against Jeffersonians).

[45] Resolutions of the General Assembly of the Commonwealth of Kentucky, November 16, 1798 [hereinafter cited as Kentucky Resolutions], *reprinted in* 4 ELLIOT'S DEBATES 540-45 (1836 ed.).

[46] Resolutions of the General Assembly of the Commonwealth of Virginia, December 24, 1798 [hereinafter cited as Virginia Resolutions], *reprinted in* 4 ELLIOT'S DEBATES 528-29 (1836 ed.).

[47] *See, e.g.*, M. SMELSER, THE DEMOCRATIC REPUBLIC 1801-1815 296-99 (1968) (discussing Hartford Convention of 1814-1815, at which delegates called for "parochialism and privilege" and maintained that "unconstitutional federal acts should be countered by the states to shield their citizens"); G. DANGERFIELD, THE AWAKENING OF AMERICAN NATIONALISM 1815-1828 13-15, 279-83, 299-300 (1965) (controversy surrounding Tariff of 1816 and Tariff of 1828); and G. VAN DEUSEN, THE JACKSONIAN ERA 1828-1848 71-80 (1959) (discussing South Carolina's 1832 Ordinance of Nullification, which declared that "we [the People of South Carolina] will consider the passage, by Congress, of any act . . . to coerce the State . . . to be null and void [and] inconsistent with the longer con-

not a compact between the states but among the peoples of the states. That is what made it unique.

It must be remembered that the Kentucky and Virginia Resolutions were promulgated several years before the Supreme Court first declared a national statute to be unconstitutional[48] so that the road of state proclamation seemed more certain to the Republicans than a course of action through the courts. John Marshall, even then, however, suggested that the issue be presented for resolution in the federal courts.[49] Both sides to the controversy knew that the national courts were largely manned by strong Federalist judges who could be predicted to support—as they ultimately did—the actions of the Federalist Congress and the Federalist President.[50]

The pleas of Kentucky and Virginia to their sister states were rebuffed. They brought about complete rejection of the notion of a power of nullification and, for some, a clear affirmance of the validity of the Alien and Sedition Laws. Delaware,[51] Rhode Island,[52] Massachusetts,[53] New York,[54] Connecticut,[55] New Hampshire,[56] and Vermont,[57] through their legislatures, all

---

tinuance of South Carolina in the Union . . . .").

[48] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[49] *See* J. BAKER, JOHN MARSHALL: A LIFE IN LAW 304-07 (1974).

[50] *See* Miller, *supra* note 44, at 135-39 (entire federal bench joined crusade against "Jacobinism"); M. SMELSER, THE DEMOCRATIC REPUBLIC 64-67 (1968)(judiciary remained federalist bastion well into Jefferson's administration).

[51] Resolution of the Delaware General Assembly, February 1, 1799, *reprinted in* 4 ELLIOT'S DEBATES 532 (1836 ed.)("very unjustifiable interference with the general government").

[52] Resolution of the General Assembly of the Commonwealth of Rhode Island and Providence Plantations, February [n.d.], 1799, *reprinted in* 4 ELLIOT'S DEBATES 533 (1836 ed.)(General Assembly expressed concern over "many evil and fatal consequences which may flow" from passage of Viginia Resolutions).

[53] Resolution of the General Court of the Commonwealth of Massachusetts, February 9, 1799, *reprinted in* 4 ELLIOT'S DEBATES 533-37 (1836 ed.)(legislature refused to sanction the Virginia Resolutions for fear "the Constitution would be reduced to a mere cipher.").

[54] Resolution of the Legislature of New York, March 5, 1799, *reprinted in* 4 ELLIOT'S DEBATES 537-38 (1836 ed.)("inflammatory and pernicious sentiments").

[55] Resolution of the General Assembly of Connecticut, 2d Thursday of May, 1799, *reprinted in* 4 ELLIOT'S DEBATES 538 ("deep regret . . . explicitly disavows the principles" espoused in Virginia's opposition to Alien and Sedition Acts).

[56] Resolution of the General Court of New Hampshire, June 14, 1799, *reprinted in* 4 ELLIOT'S DEBATES 538-39 (1836 ed.)("state legislatures not proper tribunal" to adjudicate

responded by chastising Virginia and Kentucky—rather than the national government—for their actions.

It is a mistake, however, to assume that free speech and press was the central feature of the Kentucky and Virginia Resolutions. Their principal arguments were that the United States had only delegated powers,[58] that these powers were not enhanced by the "necessary and proper" clause,[59] indeed, that the limitation on national powers reserving powers over seditious libel was particularly preserved by the tenth amendment.[60] Thus, the Kentucky Resolutions asserted that "libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals."[61] But they also claimed that aliens came within the protection of the states and that the President could be given no power of deportation, especially without jury trial.[62] (These positions, of course, have since been stood on their heads by the Supreme Court.)[63]

The Alien and Sedition Laws, however, certainly roiled the nation. Congress spent much time on the question, generally showing no more objectivity in its debates than did the press, which violently took sides pro and con, depending on their loyalties to the rising fortunes of the Jeffersonians or the declining ones of the Federalists. To review the entire debate would be inappropriate here.[64] But the controversy did evoke some of the best advocacy our learned forefathers ever produced—not least

---

constitutional questions).

[57] Resolution of the General Assembly of Vermont, October 30, 1799, *reprinted in* 4 ELLIOT'S DEBATES 539 (1836 ed.)("unconstitutional in their nature, and dangerous in their tendency").

[58] *See* Kentucky Resolutions, No. 1, *supra* note 45, *reprinted in* 4 ELLIOT'S DEBATES at 540 (federal act void unless power expressly delegated by states); Virginia Resolutions, *supra* note 46, *reprinted in* 4 ELLIOT'S DEBATES at 528 (federal government lacks powers beyond those specifically enumerated).

[59] *See* Kentucky Resolutions, No. 6, *supra* note 45, *reprinted in* 4 ELLIOT'S DEBATES at 540 (liberal construction of necessary and proper clause subverts entire instrument).

[60] *Id.*, No. 3, *reprinted in* 4 ELLIOT'S DEBATES at 541.

[61] *Id.*

[62] *Id.*, Nos. 4-6, *reprinted in* 4 ELLIOT'S DEBATES at 541-42.

[63] *See* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1891)(federal government has plenary power over alien affairs); *see also* Zakonaite v. Wolfe, 226 U.S. 272, 275 (1912)(Congress may delegate power of deportation to executive branch; not criminal proceeding, so no trial necessary).

[64] For detailed treatment, see Smith, *supra* note 44, at 112-30.

by John Marshall, soon to be the great nationalist jurist, and by James Madison, the most astute politician our nation has ever produced. A few quotations will suffice to give both the flavor and substance of the arguments insofar as they related to the issue of freedom of the press.

Marshall drafted the report of the minority on the Virginia Resolutions. The report had every bit of the style and command that was later to grace his constitutional opinions as Chief Justice of the United States:

> To constitute the crime, the writing must be false, scandalous, and malicious, and the intent must be to effect some of the ill purposes described in the act.
>
> To contend that there does not exist a power to punish writings coming within the description of this law, would be to assert the inability of our nation to preserve its own peace, and to protect themselves from the attempt of wicked citizens, who incapable of quiet themselves, are incessantly employed in devising means to disturb the public repose.
>
> Government is instituted and preserved for the general happiness and safety; the people therefore are interested in its preservation, and have a right to adopt measures for its security, as well against secret plots as open hostility. But government cannot be thus secured, if, by falsehood and malicious slander, it is to be deprived of the confidence and affection of the people. It is in vain to urge that truth will prevail, and that slander, when detected, recoils on the calumniator. The experience of the world, and our own experience prove that a continued course of defamation will at length sully the fairest reputation, and will throw suspicion on the purest conduct. Although the calumnies of the factious and discontented may not poison the minds of a majority of the citizens, yet they will infect a very considerable number, and prompt them to deeds destructive of the public peace, and dangerous to the general safety.[65]

So much for the tenth amendment. Marshall turned to the meaning of the freedom of the press which the first amendment

---

[65] The Address of the minority in the Virginia Legislature to the People of that State, containing a Vindication of the Constitutionality of the Alien and Sedition Laws, Journal, Virginia House of Delegates (Dec. 1798), *reprinted in* JOHN P. ROCHE, JOHN MARSHALL: MAJOR OPINIONS AND OTHER WRITINGS 42-43 (1967).

said should not be abridged. His emphasis was on the word "abridged":

> If by freedom of the press is meant perfect exemption from all punishment for whatever may be published, that freedom never has, and most probably never will exist. It is known to all, that the person who writes or publishes a libel, may be both sued and indicted, and must bear the penalty which the judgment of his country inflicts upon him. It is also known to all that the person who shall libel the government of the state, is for that offense punishable in a like manner. Yet this liability to punishment for slanderous and malicious publications, has never been considered as detracting from the liberty of the press. In fact the liberty of the press is a term which has a definite and appropriate signification, completely understood. It signifies a liberty to publish, free from previous restraint, any thing and every thing at the discretion of the printer only, but not the liberty of spreading with impunity false and scandalous slanders, which may destroy the peace, and mangle the reputation, of an individual or of a community.
>
> If this definition of the term be correct, and it is presumed that its correctness is not to be questioned, then a law punishing the authors and publishers of false, malicious and scandalous libels can be no attack on the liberty of the press.[66]

James Madison relied heavily on the limited powers of the national government,[67] on rejection of the common law being any part of the national law,[68] on a false but tempting equation between the religion clauses and the speech and press clause,[69] and on the difference in the form of government between England and the United States as justification for a difference in the law.[70] He gave the game away, however, when he made clear that what he was objecting to was trial of offenders under federal law in the federal courts by federal judges appointed by the very President who had invoked the Alien and Sedition Laws to be-

---

[66] *Id.* at 46-47.

[67] *See* Madison, Report on the Virginia Resolutions, *reprinted in* 4 ELLIOT'S DEBATES 546-50 (1861 ed.).

[68] *Id.* at 561-67.

[69] *Id.* at 571.

[70] *Id.* at 569-70.

gin with, and by juries drawn by Federalist marshals. He acknowledged that published slanders were subject to sanction in state courts in which freedom of the press was equally sacrosanct under constitutional provisions.[71] Calumniators of the national government, it was implicit in his argument, would receive more sympathetic treatment in the state courts which were not beholden to the American President. In his Address on the Sedition Law, Madison said:

> It is vicious in the extreme to calumniate meritorious public servants; but it is both artful and vicious to arouse the public indignation against calumny in order to conceal usurpation. Calumny is forbidden by the laws, usurpation by the Constitution. Calumny injures individuals, usurpation, States. Calumny may be redressed by the common judicatures; usurpation can only be controlled by the act of society. Ought *usurpation*, which is most mischievous, be rendered less hateful by *calumny*, which, though injurious, is in a degree less pernicious? But the laws for the correction of calumny were not defective. Every libellous writing or expression might receive its punishment in the State courts, from juries summoned by an officer, who does not receive his appointment from the President, and is under no influence to court the pleasure of Government, whether it injured public officers or private citizens . . . .[72]

The contest then was not so much over the freedom of the press from punishment for the publication of libels as between the appropriate realms of the state and national governments. This was the first big battle over the necessary and proper clause as a multiplier of the powers specified in the first seventeen clauses of article I, section 8. The next one would come with the Bank of the United States, when Marshall would put the imprimatur of the Supreme Court on the expansive reading of the necessary and proper clause for which he contended in the

---

[71] *Id.* at 570-71. Madison argued that Congress should make laws only where it has the specified power to do so or else the judiciary will not be able to control Congressional authority. Madison, *supra* note 67, at 568.

[72] Madison, Address of the General Assembly to the People of the Commonwealth of Virginia (Jan. 23, 1799), *reprinted in* 6 WRITINGS OF JAMES MADISON 334 (G. Hunt ed. 1906).

battle over the Alien and Sedition Laws.[73]

Madison, did, however, make a solid point about the logical deficiency in an interpretation of "the freedom of the press" which barred only prior restraint but not consequent punishment. In his *Report on the Virginia Resolution* he wrote:

> The freedom of the press under the common law, is, in the defences of the Sedition Act, made to consist in an exemption from all previous restraint on printed publications, by persons authorized to inspect or prohibit them. It appears to the committee, that this idea of the freedom of the press, can never be admitted to be the American idea of it, since a law inflicting penalties on printed publications, would have similar effect with a law authorizing a previous restraint on them. It would seem a mockery to say, that no laws should be passed, preventing publications from being made, but that laws might be passed for punishing them in case they should be made.[74]

Of course, such a distinction was not unknown to the common law, which denied power to enjoin criminal acts before they were committed but did not prevent their punishment after the event.[75] But that was hardly a satisfactory answer to the Madison objection that the practical effect of threatened punishment could be as stifling of free expression as a prior restraint. The writings of the time do not seem to have dealt with the question, although the rule against prior restraint does suggest a distinction between publication, which is to be free, and the consequences of publication, for which the writer or publisher may be held responsible.

Recently there was celebrated the twentieth anniversary of the Supreme Court's decision in *New York Times Co. v. Sullivan*,[76] certainly a landmark decision in the development of the law of the first amendment. In that decision, the Court sug-

---

[73] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819).

[74] Madison, *supra* note 67, at 569.

[75] *See, e.g.*, Commonwealth v. Blanding, 3 Mass. (3 Pick.) 304, 313 (1825)("The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep firearms, which does not protect him who uses them for annoyance or destruction.").

[76] 376 U.S. 254 (1964).

gested that the Sedition Act was unconstitutional *ab initio*.[77] But that conclusion was as devoid of reason as it was of authority. That the Act should be declared unconstitutional if it were reenacted tomorrow takes little clairvoyance. But, unlike the rulers of Oceania, even in 1986, neither we nor our judges have any legitimate authority to rewrite history to our liking. As of the Federalist period and beyond, court after court sustained and applied the Blackstonian reading of the meaning of freedom of the press.[78] (It should be remembered that the statute itself by its terms became ineffective two years after its enactment, so that if the Jeffersonians wanted similar protection for themselves from a vicious press, they would have to frame their own law to that end. The Jeffersonians did not do so. They were perfectly satisfied with the relief that could be had in the state tribunals under state laws, especially since the federal judiciary continued to be manned by Federalist judges long after the Federalists were replaced by true-blue Virginians in the national executive, first by Jefferson, then by Madison, and then by Monroe. The Jeffersonians tried but failed to displace the Federalist judges: the removal of Samuel Chase by impeachment narrowly failed in the Senate.[79] But it did put the fear of the new gods even into Marshall himself. Jefferson did all he could by pardoning those whom the Federalists had convicted and remitting their fines.[80])

---

[77] *Id.* at 276.

[78] *See, e.g.*, Near v. Minnesota *ex rel.* Olson County Attorney, 283 U.S. 697, 720 (1931)(possibility that freedom of press may be abused does not make immunity from prior restraint any less needed; subsequent punishment for abuse is proper remedy); Patterson v. Colorado, 205 U.S. 454, 462 (1907)(purpose of freedom of press is to prohibit prior restraint but not to prohibit subsequent punishment); Dailey v. Superior Court of City and County of San Francisco, 44 P. 458, 459-60 (Cal. 1896)(California Constitution provided that there could be no prior restraint on right to free speech, but speaker was responsible for abuse of that right); *Ex parte* Neill, 22 S.W. 923, 924 (Tex. Crim. App. 1893)(Texas Constitution granted one freedom to write or publish his opinion on any subject, but he accepted responsibility and punishment for such publication if proved to be improper).

[79] The impeachment of Justice Chase is described in 2 H. ADAMS, A HISTORY OF THE UNITED STATES DURING THE FIRST ADMINISTRATION OF THOMAS JEFFERSON 147-59 (1962). For a detailed treatment from a different perspective, see 1 W. C. BRUCE, JOHN RANDOLPH OF ROANOKE 200-21 (1922). Randolph, as Republican floor leader, managed the impeachment effort.

[80] *See* Letter, Thomas Jefferson to Abigail Adams (July 22, 1804), in 11 WRITINGS OF

Nor is there any doubt of the partisanship of the federal judges in administering the Sedition Law.[81] Nevertheless, it is clear that the judicial opinions of the time accepted Marshall's explication of the meaning of the freedom of the press clause in the first amendment.[82] And, however appealing the principles sought to be invoked in their defense, there can be little doubt that the roster of defendants in these cases was made up of rascals, rogues, scamps, and scalawags, publishers whose sentiments were for sale to the highest bidder.[83] But we are no less grateful to John Wilkes for his contributions to our liberties because he was a reprobate and sinner of no mean proportions.[84] So, too, those convicted under the Sedition Law wear the laurels of history.

That the Marshallian notion of the meaning of freedom of the press continued to prevail long after the controversy over

---

THOMAS JEFFERSON 43-46 (A. Lipscomb ed. 1904).

[81] *See* J. MILLER, *supra* note 44, at 136 ("crusade" of federal bench); M. SMELSER, *supra* note 50, at 70 (Chase described as "the Jeffreys of the Sedition Act prosecutions" because of his unrestrained partisanship). *See generally* SMITH, *supra* note 44, at 189-417 (detailed accounts of individual cases).

[82] *See, e.g.*, Respublica v. Oswald, 1 U.S. (1 Dall.) 319, 325 (1788)("The true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due to the peace and dignity of society to enquire into the motives of such publication, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity.").

[83] J.M. Smith recounts the stories of these worthies in his book, *supra* note 44. They include Benjamin Bache, who reprinted certain letters the British had forged during the Revolution to discredit Washington, *id.* at 189, and James Callender, "one of the leading scandal-mongers . . . of the day," *id.* at 335-36. Nor should we forget Luther Baldwin. After being told that a twenty-one gun salute was being fired in honor of John Adams, he remarked that he "did not care if they fired through his a___." He was prosecuted for seditious libel. *Id.* at 270-76.

[84] John Wilkes became notorious for making scurrilous attacks on King George III and his ministers through his journal, the *North Briton*. The general tone of Wilkes' writings may be inferred from his charge that George III's friend and prime minister, the Earl of Bute, was having an affair with the King's mother. But Wilkes' prosecution for seditious libel was based not on this but on his charge that Bute's successor, Grenvile, had caused the King to lie in his speech proroguing Parliament in 1763. Justice Charles Pratt (later Lord Camden) ordered Wilkes discharged a week after his arrest because of the government's unlawful use of general warrants. A good account of this affair can be found in R. J. WHITE, THE AGE OF GEORGE III 62-80 (1969). For a more dramatic account of Wilkes' character and career, see R. POSTGATE, THAT DEVIL WILKES (1929).

the Sedition Law had died is evidenced by another phenomenon, the provisions in the newly emerging state constitutions. It will be recalled that the early provisions, such as that in the Virginia Bill of Rights, extolled the values of freedom of the press in the broadest terms.[85] The Maryland Constitution of 1776 and the Delaware Declaration of Rights of the same year, for example, used equally extravagant language: "That the liberty of the press ought to be inviolably preserved."[86] When the new constitutions came to be written, the importance of a free press was no less emphasized, but the Blackstonian qualification and that of the Sedition Act itself were specifically written in. For example, the Kentucky Constitution of 1799, with the heat of the controversy over the Sedition Law still little abated, provided in article X:

> Sec. 7. That printing-presses shall be free to every person who undertakes to examine the proceedings of the legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, *being responsible for the abuse of that liberty.*
>
> Sec. 8. In prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases.[87]

IV. Lessons From History

There are, indeed, lessons to be learned from the history of the origins of the freedom of press clause of the first amendment. And the first of them is that suggested in *New York*

---

[85] *See supra* text accompanying note 19.

[86] Md. Const. of 1776, § 38, *reprinted in* 3 Thorpe, *supra* note 29, at 1690; Del. Declaration of Rights of 1776, § 23, Del. Code Ann. (1974).

[87] Ky. Const. of 1799, §§ 7-8, *reprinted in* 3 Thorpe, *supra* note 29, at 1289 (emphasis added).

Times Co. v. Sullivan, that the focus of the amendment was on seditious libel.[88] Indeed, there is very little to the historical record that was not concerned with justifying the constitutional restraint in terms of the necessity for allowing dissemination of information about government and providing criticism of government behavior. It was protection of political speech that was the objective to be served by the free press clause. And this was all the more necessary for government which was republican in form, where "we, the people" were sovereign, and the government only a means to self-rule.

It does not follow, of course, that the first amendment went beyond prevention of prior restraint. There is no substantial evidence that criminal libels were intended to be freed from consequent sanctions. Except when the wish becomes father to the thought, as it does so often in the writings of Supreme Court Justices and law professors, the first amendment was not in its origins the expansive license it has since become. Grateful as we must be for the improvements that the Court has made in the Bill of Rights, we must give the credit—and the blame, if there is any—where it is due, not to Madison and his confreres who framed it but to the Justices of the Supreme Court, who, while making the proper genuflections to history, frequently observe its teaching more in the breach than in the observances.

It must be remembered, however, that the Justices of the Supreme Court are not today composing a Constitution for 1787 or 1789 to forestall the evils of those days. They are extrapolating new principles from old to frame a Constitution to guard against the tribulations of our own time. I regret only that they do not go about their tasks with the honesty that their high office demands. Better they should tell us what they are really about than to pretend they are merely the voices of the great men who originally composed the document now entrusted to their care.

It is a long time from yesterday to today. Since 1789, the earth has spun on its axis more than 70,000 times; the earth has

---

[88] *See New York Times Co.*, 376 U.S. at 273-76 (Sedition Act of 1798, in its suppression of free public discussion, created a "national awareness" of the significance of the first amendment).

made its orbit around the sun almost two hundred times. But the revolutions within our society during this time are countless. We have learned things about the need for a free press that none could have foreseen when provision for it was made in the first amendment. Government is no longer a handful of men in a national or state capital. And the news media is not a few small letterpresses available to vent the spleen of any who would hire them. Government is a giant octopus with its tentacles everywhere in the lives of the citizenry. And the media are sprawling empires of highly technical machinery that are at least as pervasive in their direct effects on our lives. The contest between government and press for control of our lives makes us grateful that they are adversaries. Should they join forces, what freedom we have left should be certain to perish. It would be a mistake to assume that one is hero and the other villain. The freedom-seeking man must look askance at both.

Listen to the words of warning of Judge Learned Hand, delivered in 1942, before World War II was resolved, in his tribute to Mr. Justice Brandeis, and see if you find no analogy to our own problems:

> [T]he day has clearly gone forever of societies small enough for their members to have personal acquaintance with one another, and to find their station through the appraisal of those who have any first-hand knowledge of them. Publicity is an evil substitute, and the art of publicity is a black art; but it has come to stay; every year adds to its potency and to the finality of its judgments. The hand that rules the press, the radio, the screen and the far-spread magazine, rules the country; whether we like it or not, we must learn to accept it. And yet it is the power of reiterated suggestion and consecrated platitude that at this moment has brought our entire civilization to imminent peril of destruction. The individual is as helpless against it as the child is helpless against the formulas with which he is indoctrinated. Not only is it possible by these means to shape his tastes, his feelings, his desires and his hopes; but it is possible to convert him into a fanatical zealot, ready to torture and destroy and to suffer mutilation and death for an obscene faith, baseless in fact, and morally monstrous. This, the vastest conflict with which mankind has ever been faced, whose outcome still remains undecided, in the end turns upon whether the in-

> dividual can survive; upon whether the ultimate value shall be this wistful cloudy, errant, You or I, or that Great Beast, Leviathan, that phantom conjured up as an *ignis fatuus* in our darkness and a scapegoat for our futility.[89]

And that, too, is a lesson of the history of the origins of the first amendment, the commitment to freedom for the individual. And we know now, better than they knew then, that freedom for the individual consists no less of freedom of thought than freedom of action. As Mr. Justice Jackson once told us: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[90] He told us this in what remains one of the great first amendment opinions of our times, the second Flag Salute Case. It was in that case, too, however, that he afforded an explanation of the meaning of the rule against prior restraint, although he was speaking in broader terms. He said there:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.[91]

That is exactly the way that the freedom of the press clause was read by its initiators. It removed all questions of the right to publish from the discretion of government censors. It left the question of the propriety of punishment for abuse of the privilege to the judicial process with the full panoply of protections afforded by the concepts of the rule of law and due process, including trial by jury.

You may, at this time, feel like Winston Churchill when once served with a not untypical English pudding that seemed to have neither form nor substance. He reportedly beckoned the waiter and said: "Pray, take this pudding away. It has no theme." Alas, I cannot take back what I have already proferred.

---

[89] L. Hand, The Spirit of Liberty 172-73 (2d ed. rev. 1953).
[90] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
[91] *Id.* at 638.

But perhaps I can make its outlines a bit more certain.

What then are the lessons that might be learned from the history of the origins of the first amendment? The clearest is the least palatable, for it is the opposite of what our nine masters purported to learn from that history in 1964.[92] It is that freedom of press did not preclude punishment of seditious libel, but only its prior restraint.

The Founding Fathers taught us more than this, however. Jefferson would have us learn that newspapers were an extraordinarily important element in the self-government on which the new nation had embarked. There were times when he embarked on hyperbole, first on one side of the question and then on the other. Thus, he wrote to Edward Carrington on January 16, 1787:

> The people are the only censors of the governors: and even their errors will tend to keep these to the true principles of the institution. To punish these errors too severely would be to suppress the only safeguard of the public liberty. The way to prevent these irregular interpositions of the people, is to give them full information of their affairs through the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people. The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.[93]

On the other hand, in a letter to John Norvell in 1807, his euphoria for the press was more than a little dampened. There he wrote:

> It is a melancholy truth, that a suppression of the press could not more completely deprive the nation of its benefits, than is done by its abandoned prostitution to falsehood. Nothing can now be believed which is seen in a newspaper. Truth itself be-

---

[92] *See New York Times Co.*, 376 U.S. at 270-277 (criticism of government and officials was permitted as necessary to first amendment right of free communication).

[93] Letter, Thomas Jefferson to Edward Carrington (June 16, 1787), in 6 WRITINGS OF THOMAS JEFFERSON 57-58 (A. Lipscomb ed. 1904).

> comes suspicious by being put into that polluted vehicle. The real extent of this state of misinformation is known only to those who are in situations to confront facts within their knowledge with the lies of the day. I really look with commiseration over the great body of my fellow citizens, who, reading newspapers, live and die in the belief, that they know something of what has been passing in the world in their time; whereas the accounts they have read in newspapers are just as true a history of any other period of the world as of the present, except that the real names of the day are affixed to their fables . . . . no details can be relied on. I will add, that the man who never looks into a newspaper is better informed than he who reads them; inasmuch as he who knows nothing is nearer to truth than he whose mind is filled with falsehood and errors. He who reads nothing will still learn the great facts, and the details are all false.[94]

It should be remembered that, however often Jefferson is cited as condemning the constitutionality of the Alien and Sedition Laws, it was basically because, like Madison whose words I have already quoted, he thought the subject beyond the ken of the national government, not because newspapers were beyond chastisement by government for what they published. In the Kentucky Resolutions themselves, Jefferson wrote that it was for the States to determine "how far the licentiousness of speech, and of the press, may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use, should be tolerated rather than the use destroyed. . . ."[95]

For all his talk about freedom of the press, it must be remembered, too, that, both as Governor of Virginia and as President of the United States, Jefferson found prosecution of his political enemies for criminal libel to be a wholesome endeavor. Thus, he wrote to Governor McKean of Pennsylvania, in 1803: "[A] few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the

---

[94] Letter, Thomas Jefferson to John Norvell (June 11, 1807), in 11 WRITINGS OF THOMAS JEFFERSON 224-25 (A. Lipscomb ed. 1904).

[95] Kentucky Resolutions, No. 3, *reprinted in* 4 ELLIOT'S DEBATES at 541.

presses."[96]

This, however, need not denigrate the Jeffersonian idea that the necessity for freedom of the press rested on the need for government to be subjected to the severest scrutiny by its critics who were to inform the public of its behavior. Neither for Jefferson any more than for Madison were men angels. Those in government were no more to be trusted than those in trade. (Only small farmers were likely to be virtuous.)[97] Some of the wisest men in America in those times—and some even today—regard government as a necessary evil. A system of checks and balances within government was an essential means of avoiding concentration of power. The press was but a part of this system, reporting directly to the sovereign people. Who was to watch this watchdog? Obviously that was to be the role of the judiciary—the state judiciary if Jefferson and Madison were to have their way.

Benjamin Franklin, the patron saint of the American press, frequently referred to alternatively as the wisest and most dangerous man in America, did not look kindly on the inclination of the press to claim a privilege to pass judgment with impunity on any and all, a claim not unlike the one later made for it by Mr. Justice Black.[98] In 1789, shortly after he helped make the Constitution of the United States possible by his mere attendance at the framing convention, Franklin published a satirical paper that deserves your enjoyment in toto. I extract here a small item:

> If by the *Liberty of the Press* were understood merely the Liberty of discussing the Propriety of Public Measures and political opinions, let us have as much of it as you please: But if it means the Liberty of affronting, calumniating, and defaming

---

[96] Letter, Thomas Jefferson to Thomas McKean (Feb. 19, 1803), in 8 WRITINGS OF THOMAS JEFFERSON 218 (P.L. Ford ed. 1897).

[97] The classic expression of Jefferson's agrarianism occurs in *Notes on Virginia*: "Those who labor in the earth are the chosen people of God, if ever He had a chosen people, whose breasts He has made His peculiar deposit for substantial and genuine virtue." T. JEFFERSON, *Notes on the State of Virginia*, in 2 WRITINGS OF THOMAS JEFFERSON 229 (A. Lipscomb ed. 1904).

[98] *See New York Times Co.*, 376 U.S. at 296 (Black, J., concurring)(giving press privilege to criticize officials with impunity).

> one another, I, for my part, own myself willing to part with my Share of it when our Legislators shall please so to alter the Law, and shall cheerfully consent to exchange my *Liberty* of Abusing others for the *Privilege* of not being abus'd myself.[99]

There were other concerns about the press. Some were worried about the subservience of the press to the government. For example, an anti-Federalist wrote to John Wilson in 1787: "It is an easy step from restraining the press to make it place the worst actions of government in so favorable a light, that we may groan under tyranny and repression without knowing from whence it comes."[100]

We learn from this history, too, that the founders were conversant with laws that protected speech not only from censorship but from post-publication sanctions. Thus, in affording such protection to Congress in the Constitution, they provided for an absolute, not a conditional, privilege: "for any Speech or Debate in either House, they shall not be questioned in any other Place."[101] The common law also spoke in terms of freedom of speech when it was affording absolute protection and not merely prepublication immunities. Thus, as James Burgh put it in his *Political Disquisitions* in 1775: "In a petition to parliament, a bill in chancery, and proceeding at law, libellous words are not punishable; because freedom of speech and writing are indispensably necessary to the carrying on of business."[102] But these protections, whether of legislators or petitioners, or litigants, were accepted as special, not general, rules of free speech and press, i.e., speech or writing could not invite government sanctions if exercised in the conduct of government affairs. Indeed it was this special license to government activity that precipitated in part the decision in *New York Times Co. v. Sullivan*, which, twenty years ago brought the law of libel under the

---

[99] B. Franklin, *An Account of the Supremest Court of Judicature in Pennsylvania, viz., the Courts of the Press* (Sept. 12, 1789), *reprinted in* BENJAMIN FRANKLIN: REPRESENTATIVE SELECTIONS 502 (F. Mott & C. Jorgenson ed. 1936).

[100] Letter, "Cincinnatus" to John Wilson, New York Journal, Nov. 8, 1787, *cited in* J. T. MAIN, THE ANTI-FEDERALISTS 160 n.72 (1961).

[101] U.S. CONST. art. I, § 6, cl.1.

[102] 3 J. BURGH, POLITICAL DISGUISITIONS: OR, AN ENQUIRY INTO PUBLIC ERRORS, DEFECTS AND ABUSES bk. I, ch. IX, at 247 (1775).

umbrella of the first amendment,[103] although its implications are still not completely resolved.

This history also teaches us that there was a patent if not necessarily real anomaly in providing that a person may publish what he chooses, but that government may punish him for what he published. Perhaps the answer to the anomaly lies in the fact that the doctrine of prior restraint distinguishes between publication, which cannot be inhibited, and injuries resulting from such publication, for which sanctions can be invoked. But shifting the emphasis of constitutional scrutiny to the effects rather than the words did not come to the forefront of first amendment theory until Holmes formulated his "clear and present danger" doctrine,[104] at which modernists now tend to sneer,[105] but which may remain the only principle on which first amendment theory may ultimately be rationalized.

Perhaps the clearest teaching of the history of the origins of the first amendment is the lesson I already quoted from Hamil-

---

[103] *See New York Times Co.*, 376 U.S. at 264-66.

[104] Schenck v. United States, 249 U.S. 47, 52 (1919). The defendants challenged their conviction for distributing literature directed toward disrupting the selective service process in violation of the Espionage Act of June 15, 1917. *Id.*. at 48-49. The defendants' claim to first amendment protection fell upon deaf ears as Justice Holmes wrote the opinion for a unanimous Court. Justifying this impingement upon freedom of expression as being in the interest of national security Holmes stated:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Id. at 52. *Schenck* was followed closely by two other cases where the Court upheld the conviction of defendants under the Espionage Act of 1917. Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919). However, Holmes's clear and present danger doctrine did not receive any significant notice until 1927 in Whitney v. California, 274 U.S. 357 (1927). For a discussion on the evolution of the clear and present danger doctrine, see Strong, *Fifty Years of "Clear and Present Danger": From* Schenck *to* Brandenburg *and Beyond*, 1969 SUP. CT. REV. 41, 42-44 (1969); Corwin, *Bowing Out "Clear and Present Danger,"* 27 NOTRE DAME LAW. 325, 356-95 (1952); Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COLO. L. REV. 313 (1952); J. NOWAK, CONSTITUTIONAL LAW 874-86 (2d ed. 1983).

[105] *See* Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 584-94 (1981)(influence of Zachariah Chafee upon the development of the clear and present doctrine after *Schenck, Frahwerk* and *Debs*); Gunther, *Learned Hand and The Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 735-41 (1975)(Judge Hand was critical of Justice Holmes's clear and present danger doctrine at its inception, viewing it as an impingement on free speech).

ton's eighty-fourth *Federalist*.[106] Freedom of the press will rest not on words in a constitutional document, but on a mood of tolerance that will ebb and flood, probably at its lowest when our need for it is greatest, when we do not feel as secure as we should like to feel. For, as Learned Hand once put it:

> I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.[107]

And this explains the importance of freedom of press and speech in a free society. The spirit of liberty, about which Hand was speaking, will be nurtured by freedom of ideas and communication of those ideas, or it will perish from lack of sustenance.

If, however, a free press is a necessary, it is not a sufficient, condition to a free society. The McCarthy Era, the Vietnam War, the imperial presidency were as much the creatures of the press as the objects of their scrutiny. And we still lack the means of making the press both free and responsible. Until it becomes responsible as well as free, there is always the danger that the price of its freedom will be our freedom. But responsibility for the press, like responsibility for the courts, i.e., responsibility for fulfilling their functions competently and honestly, cannot be imposed from outside. And, as each of us knows from his own experience, self-restraint, unaided by external force, is the most difficult of achievements.

But, the reader might think, the pudding has still not gelled. All I have reported of the origins of the first amendment remains a disorganized glop. Well, perhaps that is the nature of the pudding, and neither we nor Winston Churchill should have expected more. To recur once more to Learned Hand,

> Nor need it surprise us that these stately admonitions refuse to subject themselves to analysis. They are the precipitates of

---

[106] *See supra* note 38 and accompanying text.

[107] L. Hand, The Spirit of Liberty 189-90 (2d ed. rev. 1953).

> 'old, unhappy, far-off things, and battles long ago,' originally cast as universals to enlarge the scope of victory, to give it authority, to reassure the very victors themselves that they have been champions in something more momentous than a passing struggle. Thrown large upon the screen of the future as eternal verities, they are emptied of the vital occasions which gave them birth, and became moral adjurations, the more imperious because inscrutable, but with only that content which each generation must pour into them anew in light of its own experience.[108]

Perhaps, then, all we can learn from this history of the origins of the first amendment is how little history has to teach us by way of particular solutions to the particular problems of our own day, problems that history never faced and, so far as I can discover, never contemplated. At least, this study should make us skeptical of the prepackaged histories that we are constantly offered to prove that our side of the controversy is on the side of history or vice versa. Such history tends to be selected as legal precedents are selected, for their rhetorical rather than their substantive values.

Benjamin Franklin said when he emerged from the 1787 Convention, and was asked the nature of the new government: "A republic, if you can keep it."[109] Whether future generations of Americans can keep it depends on them, not on Franklin, or Jefferson, or Hamilton, or Madison. I am sorry to predict that the job will be an even harder one than theirs was.

---

[108] *Id.* at 163.

[109] *Papers of Dr. James McHenry of the Federal Convention of 1787*, 11 AM. HIST. REV. 595, 618 (1906).

AN ANALYSIS OF MISSISSIPPI'S TREATMENT OF FOREIGN CORPORATIONS

*Felicia Dunn-Cooper**

I. INTRODUCTION

The state legislature enacted the Mississippi Business Corporations Act[1] in 1962 following the guide of the Model Business Corporations Act.[2] Section 79-3-211 of the Mississippi Act mandates that a foreign corporation obtain a certificate of authority before transacting intrastate business.[3] Those corporations engaged in interstate commerce are expressly excluded from the certificate requirement.[4] When a foreign corporation transacts

---

* Copyright 1985 by Felicia Dunn-Cooper.

[1] MISS. CODE ANN. §§ 79-3-1 to -293 (1972).

[2] Parker v. Lin-Co Producing Co., 197 So. 2d 228, 230 (Miss. 1967). The MODEL BUSINESS CORP. ACT §§ 1 to -152 (1960)(amended 1977) has been adopted in substance by more than thirty-five states, with many other states codifying major portions of the act. Scott, *Preface* to MODEL BUSINESS CORP. ACT at xiii (1977).

[3] MISS. CODE ANN. § 79-3-211 (1972). The section provides in pertinent part: "No foreign business corporation for profit shall have the right to transact business in this state until it shall have procured a certificate of authority so to do from the secretary of state . . . ." *Id.*

[4] *Id.* at § 79-3-211(e). The statute states that when a foreign corporation "[t]ransact[s] any business in interstate commerce" within Mississippi, such activity shall not be considered "transacting business in this state" for the purposes of the Mississippi Business Corporations Act. MISS. CODE ANN. § 79-3-211(e)(1972).

In Cone Mills Corp. v. Hurdle, 369 F. Supp. 426 (N.D. Miss. 1974), the United States District Court for the Northern District of Mississippi held this provision to be a "recognition of a constraint imposed upon state power by the [c]ommerce [c]lause." *Cone Mills*, 369 F. Supp. at 432. The commerce clause specifies that the power to regulate commerce among the several states and with foreign nations lies with Congress. U.S. CONST. art. I, § 8, cl. 3. Section 79-3-289 of the Mississippi Code expressly states that the Mississippi Business Corporations Act applies to interstate commerce only as permitted by the United States Constitution. MISS. CODE ANN. § 79-3-289 (1972). The Fifth Circuit Court of Appeals construes section 79-3-289 as binding the Mississippi courts to a federal standard in determining what constitutes interstate commerce. Diversacon Indus. v. National Bank of Commerce, 629 F.2d 1030, 1034 (5th Cir. 1980); *Cone Mills*, 369 F. Supp. at 432; *accord*, Guyette v. C. & K. Dev. Co., 122 N.H. 913, 451 A.2d 1318, 1320

business within the state without complying with the certification requirement, section 79-3-247 denies that corporation access to the state courts.[5]

The interplay between sections 79-3-211 and 79-3-247 appears very straightforward. Yet, the ambiguity inherent in the concepts of "transacting business in this state"[6] and "interstate commerce"[7] as used in the statutes severely complicates Missis-

---

(1982)(determination whether transaction part of interstate commerce is federal question; federal law controls).

[5] MISS. CODE ANN. § 79-3-247 (1972). The Mississippi "door-closing statute" provides:

> No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state. Nor shall any action, suit or proceeding be maintained in any court of this state by any successor or assignee of such corporation on any right, claim or demand arising out of the transaction of business by such corporation in this state.
>
> The failure of a foreign corporation to obtain a certificate of authority to transact business in this state shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action, suit or proceeding in any court of this state.
>
> A foreign corporation which transacts business in this state without a certificate of authority shall be liable to this state, for the years or parts thereof during which it transacted business in this state without a certificate of authority, in an amount equal to all fees which would have been imposed by this chapter upon such corporation had it duly applied for and received a certificate of authority to transact business in this state as required by this chapter, plus all penalties imposed by this chapter for failure to pay such fees. The attorney general shall bring proceedings to recover all amounts due this state under the provisions of this section.

Id. The devastating effect of this statute is that the courthouse door is closed to corporate litigants who have not complied with certification requirements. *See* Diversacon Indus. v. National Bank of Commerce, 629 F.2d 1030, 1032-34 (metaphor for statutory ban to the "closed door").

[6] MISS. CODE ANN. § 79-3-211 (1972).

[7] *Id.* at § 211(e). One commentator has expressed the opinion that if businesses could indeed be divided into interstate and foreign commerce versus businesses of purely local concern, the constitutional status of foreign corporations would be a simple problem: interstate activity would be protected against discriminatory legislation by the commerce clause and intrastate activity would be subject to free state reign since under Paul v. Virginia, 75 US (8 Wall.) 168, 178-79 (1868), corporations are not protected under the privileges and immunities clause. *See* G. HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW 132 (1918)(commenting on constitutional provisions affecting foreign corporations). The problem, of course, becomes quite complex as the judiciary attempts to distinguish between interstate and intrastate activity. *See infra* note 15 (interstate and intrastate activity compared).

sippi's effort to regulate foreign corporations. The Mississippi Supreme Court broadly construes the "transacting business within the state" provision so as to require compliance with the certification requirements;[8] at the same time, the court construes narrowly the interstate commerce exception to certification.[9] Conversely, the federal courts take a broad view of what constitutes transacting business in interstate commerce, thus, negating the application of the certification requirement.[10]

This problem of the differences in statutory construction of the certification statute is enhanced by the fact that the Mississippi Supreme Court's construction of the door-closing statute[11] deviates drastically from the construction propounded by the drafters of the Model Business Corporations Act.[12] If a foreign corporation is found to have been engaged in business in Mississippi without having obtained the requisite authority, the Mississippi door-closing statute precludes that corporation from bringing an action in the state's courts on any cause that accrued during the period of noncompliance with certification.[13]

---

[8] *See infra* notes 11-15, 73-79 and accompanying text.

[9] *See infra* notes 57-60, 73-79 and accompanying text.

[10] *See* Allenberg Cotton Co. v. Pittman, 419 U.S. 20, 31-34 (1974)(delivery of cotton to local warehouse for interstate sale placed product in stream of interstate commerce; corporation which maintained inventory of cotton in Mississippi prior to interstate shipment was not doing business in Mississippi). *See generally* Note, *"Doing Business": Defining State Control Over Foreign Corporations*, 32 Vand. L. Rev. 1105, 1123 (1979)(federal courts reluctant to find corporations doing intrastate business).

[11] *See supra* note 5.

[12] *See infra* notes 48-57 and accompanying text.

[13] *See infra* notes 24-34 and accompanying text (Mississippi Supreme Court's construction in Parker v. Lin-Co Producing Co., 197 So. 2d 228 (Miss. 1967)). Section 124 of the 1969 Model Business Corporations Act states that a nonqualified foreign corporation transacting business in the state will be barred from suit in the courts of the state until it has obtained the certificate of compliance. MODEL BUSINESS CORP. ACT § 124. The accompanying commentary to section 124 clearly states that the scope of the section is limited to an unqualified foreign corporation's inability to maintain a cause of action to enforce its contracts where it is not in compliance with the certification requirement of section 106. *Id.* at § 124 commentary at 774. Further, qualification after a cause of action arose on the contract was deemed by the drafters of the Model Act to be sufficient to remove the disability to maintain suit. *Id.*

Parker v. Lin-Co Producing Co., 197 So. 2d 228 (Miss. 1967), held that qualification after the cause of action arose was insufficient to allow a corporation to maintain suit on that cause. *Id.* at 230. Twelve years later, in Honey Fluff Donut Co. v. Daniel, 374 So. 2d 800 (Miss. 1979), the Mississippi Supreme Court clarified the *Parker* holding somewhat

Subsequent compliance with the certification requirement does not remove the foreign corporation's disability to sue.[14] As a result of this interpretation of the door-closing statute, unqualified foreign corporations in Mississippi resort to forum-shopping in order to take advantage of the more expansive view of interstate commerce in the federal court system and to avoid the section 79-3-247 "closed-door" which confronts them in the state court system.[15]

---

when it held that a corporation, although not qualified to do business in Mississippi when it entered into a contract with the defendant, could nevertheless bring suit in a Mississippi court when it had properly qualified before the cause of action accrued. *Id.* at 802.

[14] *Parker*, 197 So. 2d at 230. The corporation may bring suit, however, if it complies with the certification statute before the cause of action accrues. *Honey Fluff*, 374 So. 2d at 801-02.

[15] *See supra* note 10.

It has been recognized by both federal and Mississippi courts that the level of doing business necessary to bar a foreign corporation from state courts is higher than the level of intrastate business necessary to subject it to taxation or service of process. Mid-Continent Tel. Corp. v. Home Tel. Co., 307 F. Supp. 1014, 1017-18 (N.D. Miss. 1969); Davis-Wood Lumber Co. v. Ladner, 210 Miss. 863, 877, 50 So. 2d 615, 621 (1951); *see* Allenberg Cotton Co. v. Pittman, 419 U.S. 20, 33-34 (1974)(deciding corporation could not be barred from state courts under commerce clause, but expressly not deciding whether it could be subject to service of process).

The commerce clause also limits the extent to which a state may regulate a business in interstate commerce. *Allenberg*, 419 U.S. at 31-32. The forum shopping occurs because the federal courts refuse to consider transactions which occur within Mississippi as "doing business" if the transactions are of interstate character, while the Mississippi courts have historically looked only to the locus of the transactions without considering whether they were part of interstate commerce. *Compare* Xyoquip, Inc. v. Mims, 413 F. Supp. 962, 966 (N.D. Miss. 1976)(Ohio corporation's finance leasing of products to Mississippi residents through Georgia corporation does not subject Ohio corporation to door-closing statute) *and* Cone Mills Corp. v. Hurdle, 369 F. Supp. 426, 436 (N.D. Miss. 1974)(cotton bought for interstate shipment and warehouse in Mississippi within interstate commerce); *and* Mid-Continent Tel. Corp. v. Home Tel. Corp., 307 F. Supp. 1014, 1021, 1023 (N.D. Miss. 1969)(Ohio corporation which rendered services only to wholly-owned Mississippi subsidiary and did not trade with anyone else in state not doing business in Mississippi) *and* Humbolt Foods, Inc. v. Massey, 297 F. Supp. 236, 238-39 (N.D. Miss. 1968)(beans bought from and services rendered to Mississippi resident by Tennessee corporation were acts of interstate, not local nature) *with* Barbee v. United Dollar Stores, 337 So. 2d 1277, 1278-79 (Miss. 1976)(Arkansas franchisor with eleven stores in Mississippi barred from suit in state court); *and* Pittman v. Allenberg Cotton Co., 276 So. 2d 678, 681-82 (Miss. 1973), *rev'd*, 419 U.S. 20 (1974)(holding entire transactions with respect to Mississippi cotton contracts took place within Mississippi thereby constituting doing business within the state and barring unqualified foreign corporation from suit within the state); *and* Alabama Live Poultry v. Ervin, 246 So. 2d 915, 916-18 (Miss.

It is unquestioned that Mississippi can impose reasonable conditions upon foreign corporations seeking to transact business within the state[16] and reasonable sanctions upon any corporation that fails to comply with those conditions while conducting intrastate business.[17] The purposes of this article are four-fold. First, this article examines the soundness of the Mississippi Supreme Court's construction of the door-closing statute[18] and the propriety of its approach to the interstate commerce exception to the certification requirement[19] toward the end of diffusing the tension between the Mississippi Supreme Court and the federal courts sitting in the state concerning the treatment of unqualified foreign corporations. Second, the possible ramifications of the continuation and escalation of the Mississippi Supreme Court's disdain for the interstate commerce exception to certification permitting unqualified foreign corporations to circumvent the statutory bar will be explored.[20] Third, this article points out the potential use of the Mississippi Rules of Civil Procedure to dilute the force of the door-closing barrier[21] and to ameliorate the disparity in treatment accorded unqualified foreign corporations in the state and federal courts in Mississippi.[22] Finally, this article examines Mississippi's position with respect to a qualified foreign corporation's amenability to suit in the courts of this state on a cause of action which accrued in another state in favor of a nonresident.[23]

1971)(Alabama corporation which purchased chickens in Mississippi and delivered them to destination in Mississippi subject to statutory bar to suit in Mississippi). *See generally* Note, *supra* note 10 (reluctance of federal courts to find intrastate business).

[16] *See* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 181 (1868)(corporate existence being dependent on state authority for creation and recognition, foreign corporation also subject to state's determination of proper terms and conditions for recognition in that state).

[17] *Id. See generally* Note, *Sanctions for Failure to Comply with Corporate Qualification Statutes: An Evaluation*, 63 COLUM. L. REV. 117, 118 (1963)(evaluating various sanctions in terms of reasonableness).

[18] *See infra* notes 35-42 and accompanying text.

[19] *See infra* notes 57-60, 72-81 and accompanying text.

[20] *See infra* notes 57-60, 95-100 and accompanying text.

[21] *See infra* notes 82-94 and accompanying text.

[22] *See supra* notes 8-15 and accompanying text.

[23] *See infra* notes 101-19 and accompanying text.

II. The Door Closing Statute and Parker v. Lin-Co.

In *Parker v. Lin-Co Producing Co.*,[24] the Supreme Court of Mississippi interpreted the corporate door-closing statute to hold that subsequent compliance with certification requirements after a cause of action accrued does not remove the statutory bar.[25] Lin-Co, a Louisiana corporation, sued Parker for negligently damaging its oil well located in Warren County, Mississippi. Parker raised as a plea in abatement[26] Lin-Co's incapacity to maintain its suit because it was an unqualified foreign corporation doing business in the state in contravention of the corporate door-closing statute.[27] The trial court found that although Lin-Co was an unqualified foreign corporation engaged in intrastate business, subsequent qualification would remove the statutory bar to Lin-Co's right to sue.[28] Lin-Co thereafter qualified to do business in Mississippi and prosecuted its suit to a judgment

---

[24] 197 So. 2d 228 (Miss. 1967).

[25] *Id.* at 230.

[26] *Id.* at 228. A plea in abatement was a common-law plea which, without disputing the merits or justice of the plaintiff's claim, objected to the time, mode, or manner of its assertion; this form of pleading was abolished under modern rules of civil procedure. Black's Law Dictionary 1037 (5th ed. 1979).

[27] *Parker*, 197 So. 2d at 228. In *Parker* the court construed Miss. Code Ann. § 5309-239 (Supp. 1964)(currently codified at Miss. Code Ann. § 79-3-247 (1972)). *See Parker*, 197 So. 2d at 228 (construing section 5309-239).

[28] *Parker*, 197 So. 2d at 228-29. The trial court's theory was that the statute prohibited only the maintaining of the suit and not the bringing of it. Thus, the suit could be dismissed only if the corporation did not qualify to do business while proceeding with the suit. *Id.* at 129. This construction finds support in the commentary to the Model Business Corporations Act, on which the Mississippi statutes are based. *See supra* note 13 and accompanying text (commentary to Model Act). This construction is also in accord with the law of the vast majority of other jurisdictions. *See, e.g.*, Arizona, Capin v. S&H Packing Co., 130 Ariz. 441, 636 P.2d 1223, 1224 (Ariz. Ct. App. 1981)(compliance with certification requirement after action commenced sufficient); New Hampshire, Peerless Corp. v. Chin, 112 N.H. 3, 287 A.2d 611, 612 (1972)(corporation could maintain action upon cause of action which accrued prior to registration); R.C. Allen Bus. Mach. Inc. v. Acres, 111 N.H. 269, 281 A.2d 162, 164 (1971)(lack of certification does not warrant dismissal, but only abatement, of suit by foreign corporation); *New York*: Tri-Terminal Corp. v. CITC Indus., 78 A.D.2d 609, 432 N.Y.S.2d 184, 185 (1980)(failure to qualify not jurisdictional impediment to suit; appropriate remedy is stay of suit until disability cured); *Texas*, Tex. Bus. Corp. Act. Ann. art. 8.18 official commentary (Vernon 1980)(makes clear that a foreign corporation may sue in the Texas courts after securing a permit, even when the cause of action arose at a time when the corporation was not qualified to do business there). *See generally* Note, *supra* note 17, at 128 (most states follow Model Act and hold compliance after accrual of cause of action will permit suit).

against Parker.[29] Parker appealed, arguing that the trial court's construction of the door-closing statute would defeat the purpose of the statute which was to ensure compliance with the certification requirements.[30]

The Mississippi Supreme Court, in its analysis to determine the legislative intent behind the door-closing statute, noted that prior to the 1962 adoption of the Mississippi Business Corporations Act, an unqualified foreign corporation doing business in Mississippi could not subsequently qualify and bring suit on a cause of action arising from transactions that occurred during the period of non-domestication.[31] In reviewing the legislative history of the current act, the court found that when the bill was introduced in the state legislature, it was identical to the comparable provision in the Model Business Corporations Act, but that, in committee, the bill was amended to delete certain phraseology.[32] The Mississippi Supreme Court determined that the

---

[29] *Parker*, 197 So. 2d at 230.

[30] *Id.* at 229; *accord* Val-U-King Homes, Inc. v. Taylor, 301 So. 2d 857, 859 (Miss. 1974)(statute enacted to encourage foreign corporations doing business in state to qualify and pay necessary fees and subject themselves to state law). *Cf.* Town and Country Plumbing Co. v. Delta Real Estate Developers, Inc., 357 So. 2d 126, 128 (Miss. 1978)(purpose of statute to facilitate orderly administration of intrastate affairs and provide public convenience).

[31] *Parker*, 197 So. 2d at 230. The Mississippi Supreme Court had stated in Davis-Wood Lumber Co. v. Ladner, 210 Miss. 863, 50 So. 2d 615 (1951), that because the phrase "transacting business" had been used in several contexts, it had no uniform meaning. The *Ladner* court further noted that, when used in the context of barring a foreign corporation from the state courts for failing to comply with the state's qualification requirements, a much higher showing of intrastate activity was required than that necessary for imposing taxes or obtaining long-arm jurisdiction. *Ladner*, 210 Miss. at 877-78, 50 So. 2d at 620-21; *see supra* note 15 (discussion of the difference in standards).

The standard set forth by the court in Peterman Const. & Supply Co. v. Blumenfield, 156 Miss. 55, 125 So. 548 (1930), for determining when a foreign corporation is doing business in Mississippi for qualification purposes was "whether or not it is doing acts as are within the functions of its corporate powers." *Blumenfield*, 156 Miss. at 56, 125 So. at 550-51. Once the foreign corporation was found to have transacted intrastate business without a certificate of authority, the court held that "subsequent procurement of a right to do business in the state" was ineffective to breathe life into the void contract. The contract was void because it was entered into during the period of noncompliance with the qualification requirements. *id.*

[32] *Parker*, 197 So. 2d at 230. Senate Bill 1712 (1962) as introduced was based on section 117 of the model act and stated that an unqualified foreign corporation transacting business within the state would not be permitted to maintain any action in any court of the state "until such corporation shall have obtained a certificate of authority." The

deletions were indicative of the legislature's intent not to change Mississippi's position toward unqualified foreign corporations doing business in the state[33] and held that a foreign corporation doing business in the state without having qualified was precluded by the door-closing statute from using the courts of Mississippi to enforce any cause of action that accrued as a result of business done while the corporation was in an unqualified capacity.[34]

"until" clause was deleted in committee. *Parker*, 197 So. 2d at 230.

[33] *Parker*, 197 So. 2d at 230. *Cf.* Ross Constr. Co. v. U.M. & M. Credit Corp., 214 So. 2d 822, 826-27 (Miss. 1968)(determining that the legislature's deletion of certain categories of "transacting business" from the model act which were in accord with prior state law did not have the effect of changing the previous state law). It must be noted that of the states listed as following the model act's removal of the statutory bar upon qualification, *supra* note 28, all have adopted statutory language without the deletion which was made by the Mississippi legislature. *Compare* MISS. CODE ANN. § 79-3-247 (1972)(no language qualifying the statutory bar to suit) *with* ARIZ. REV. STAT. ANN. § 10-124(A)(1977)(limiting the bar by "until" clause) *and* N.H. REV. STAT. ANN. § 300:8 (1977)(unqualified corporation barred from suit "so long as it fails to comply" with certification requirements) *and* N.Y. BUS. CORP. LAW § 1312 (McKinney 1963)(bar limited by "until" clause) *and* TEX. BUS. CORP. ACT ANN. art. 8.18 (Vernon 1980)(same).

[34] *Parker*, 197 So. 2d at 230. Alabama has also prohibited subsequent qualification to remove the incapacity to sue. *See* Sea Scaping Constr. Co. v. McAtee, 402 So. 2d 919, 920-21 (Ala. 1981)(court declined to adopt view that qualification subsequent to accrual of cause of action could remove bar to state courts imposed by state constitution and statute). By statute, the Alabama bar is limited to actions on contracts which were entered into during the period of noncompliance; further, the statute provides that the corporation is subject to equitable defenses. *See* ALA. CODE § 10-2A-247 (1975)(making contracts entered into during noncompliance void); *see also* Aim Leasing Corp. v. Helicopter Medical Evacuation, 687 F.2d 354, 358 (11th Cir. 1982)(applying Alabama law where defendant was in pari delicto with plaintiff; equity would not permit defendant to impose statutory bar); First Bank v. Wells, 358 So. 2d 435, 437 (Ala. 1978)(statutory bar not imposed where result would be unjust enrichment of party raising statute).

The New Hampshire court at one time subscribed to the position held by the Mississippi Supreme Court but later abandoned that view in favor of permitting compliance with the qualification requirement after accrual of a cause of action. *Compare* Peerless Corp. v. Chin, 112 N.H. 3, 287 A.2d 611, 612 (1972)(under recently amended statute concerning denial of unqualified foreign corporation's right to sue in state courts New Hampshire joined majority of jurisdictions which permit compliance after accrual of a cause of action) *and* People's Wet Wash Laundry Co. v. Dubeau, 80 N.H. 544, 119 A. 706, 706-08 (1923)(under older statute foreign corporation permitted to maintain suit only if qualification requirement complied with prior to accrual of cause of action) *with Parker*, 197 So. 2d at 230 (adhering to prior state law that compliance with qualifications requirement must have occurred before accrual of cause of action even though a new statute was applicable) *and* Peterman Constr. & Supply Co. v. Blumenfield, 156 Miss. 55, 56, 125 So. 548, 551 (1930)(compliance after accrual of a cause of action not permitted

The *Parker* court's rationale appears to be flawed. The reference to and reliance on Mississippi law prior to the adoption of the Mississippi Business Corporations Act was inappropriate; the predecessor statutes to section 79-3-247 simply imposed a fine upon any unqualified corporation transacting intrastate business.[35] The Mississippi Supreme Court had, however, construed the predecessor statutes such that they were deemed by judicial rule to void any contracts entered into by an unqualified foreign corporation doing business in the state.[36] As a natural consequence, those foreign corporations that had not complied with the qualification requirements could not enforce in the state courts a nonexistent contract. In accord with fundamental contract principles, qualification by the foreign corporation after the formation of the contract could not relate back to breathe life into the void contract.[37]

That the *Parker* court carried forward into its construction of the door-closing statute the analysis of these predecessor statutes defied logic since the legislature, in enacting the new statute, negated the fundamental premise upon which prior Mississippi law was based. The legislature determined that the failure

---

under older statute).

Vermont, like Alabama, has prohibited removal of the bar to a foreign corporation's right to maintain all actions on contracts in the state's courts which accrued during a period of noncompliance with the qualification requirement. *See* VT. STAT. ANN. tit. 11, § 2120 (1984)(no action on contract entered into during noncompliance maintainable); A&W Artesian Well Co. v. Tornabene, 124 Vt. 413, 207 A.2d 540 (1965)(unqualified foreign corporation could not institute action on contract made in Vermont in Vermont courts).

[35] *See* MISS. CODE ANN. § 5343 (1942)(repealed 1962)(fine for noncompliance). Section 5343 read, in pertinent part: "[A]ny foreign corporation which shall not file a copy of its charter or certificate or articles of incorporation as provided by this act, shall be liable to a fine of not less than $100.00. . . . " *Id.* The *Parker* Court did not cite this statute but relied instead on § 5319. *See Parker*, 197 So. 2d at 230. Section 5319 provided that any foreign corporation which had not designated a resident agent would not be permitted to maintain any action in any courts of the state. MISS. CODE ANN. § 5319 (1942)(amended 1962).

[36] *See* Quartette Music Co. v. Haygood, 108 Miss. 755, 767, 67 So. 211, 212 (1915)(where corporation does not register with secretary of state as required by statute, all contracts entered into by corporation void; penalty implies prohibition).

[37] Peterman Constr. & Supply Co. v. Blumenfield, 156 Miss. 55, 65-66, 125 So. 548, 550-51 (1930). A void contract is defined as "[o]ne which never had any legal existence or effect, and such contract cannot in any manner have life breathed into it." BLACK'S LAW DICTIONARY 1412 (5th ed. 1979).

of a foreign corporation to comply with certification requirements would no longer impair the validity of any contract entered into by that corporation.[38] The *Parker* court ignored this legislative determination when it concluded that the legislature intended instead to adhere to established case law.[39] At best, the court seized upon *Parker* as a means of reducing the workload of the state courts by summarily eliminating most cases filed by unqualified foreign corporations.[40] At worst, the court abused its power to interpret statutes and superimposed its own attitude toward uncertified foreign corporations[41] over the intent of the state legislature.[42] Neither reason justifies this judicial overreaching.

III. The Interstate Commerce Exception of Section 79-3-211

In *Erie R.R. v. Thompkins*,[43] the United States Supreme Court determined that when the diversity jurisdiction of a fed-

---

[38] *See* Miss. Code Ann. § 79-3-247 (1972)(door-closing statute). Section 79-3-247 expressly provides that "[t]he failure of a foreign corporation to obtain a certificate of authority to transact business in this state shall not impair the validity of any contract or act of such corporation . . . ." *Id.* The Mississippi Supreme Court recognized this change when it held, in Honey Fluff Donut Co. v. Daniel, 374 So. 2d 800 (Miss. 1979), that compliance with certification requirements after the corporation had made a contract in Mississippi, but before the cause of action accrued, was sufficient to keep the statutory bar from having effect. *Id.* at 801-02.

[39] *See Parker*, 197 So. 2d at 230 (failure to consider statutory validity of contracts when citing prior contract caselaw as authority).

[40] All court systems have complained about the backlog of cases and the ever-increasing workload that justices must endure. By denying every domesticated foreign corporation access to state courts on causes of action that accrued prior to compliance with the qualification statute, a large class of cases would be quickly disposed of and the docket thus reduced. *See generally* Marcus, *Judicial Overload: The Reasons and the Remedies*, 28 Buffalo L. Rev. 111, 131-32 (1979)(commenting on the United States Supreme Court's effort to dispose of a large number of cases utilizing lack of standing rationale).

[41] *See generally* W. Gossett, Corporate Citizenship 165-167 (1957)(discussing the attitude of the courts historically toward business enterprises perceived as abusing the individual citizen).

[42] *Compare supra* note 33-34 and accompanying text (Mississippi Supreme Court's determination of legislative intent) *with supra* notes 38-39 and accompanying text (legislative intent as evidenced by statutory changes).

[43] 304 U.S. 64 (1937).

eral court is involved,[44] the federal court is in the posture of another state court and should therefore apply state law.[45] This rule was expressly applied to certification statutes in *Woods v. Interstate Realty*[46] when the Court held that where there was a bar to an unqualified foreign corporation's right to recovery in a state court, the corporation would also be prohibited from obtaining relief based on diversity jurisdiction in a federal court.[47]

Subsequent to these decisions, the Model Business Corporations Act was drafted.[48] The authors of the Act apparently desired that state regulatory power over foreign corporations continue while ensuring that foreign corporations had access to a

---

[44] *Id.* at 71. In diversity of citizenship cases a corporation is considered to be a "citizen" of both the state of its incorporation and the state of its principal place of business. 28 U.S.C. § 1332 (1982); *see* Terral v. Burke Constr. Co., 257 U.S. 529, 532-33 (1922)(state cannot force foreign corporations to relinquish right to resort to federal courts as a condition to granting authority to do intrastate business; right of action of one citizen to sue citizen of another state in federal court is guaranteed by the Constitution); Home Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 453 (1847)(state may neither limit nor grant federal jurisdiction). *See generally* W. Cook, Principles of Corporation Law 472 (1925)(states cannot interfere with jurisdiction of federal courts).

Recently, federal courts have viewed state statutes which deny uncertified foreign corporation access to the courts as impermissibly interfering with the jurisdiction of the federal courts. *See, e.g.*, Grand Bahama Petroleum Co. v. Asiatic Petroleum Corp., 550 F.2d 1320, 1325 (2d Cir. 1977)(local statute limiting federal diversity jurisdiction placed improper financial burden on foreign corporation); Virgilio Flores, S.A. v. Jerome Radelman, Inc., 567 F. Supp. 577, 579 (E.D.N.Y. 1982)(failure of foreign corporation to comply with qualification statutes not a jurisdictional defect); Oliver Prod. v. Tams-Witmark Music Library, 535 F. Supp. 1224, 1228 n.2 (S.D.N.Y. 1982)(noting growing disenchantment with the application of "closed door" statutes to diversity cases); American Expert Lines, Inc. v. J. & J. Distrib. Co., 452 F. Supp. 1160, 1162-63 (D.N.J. 1978)(citing David Lupton's Song v. Automobile Club, 225 U.S. 489, 500 (1912), for proposition that states have no authority to determine who has access to federal courts).

[45] *Erie*, 304 U.S. at 78. The Court noted that the constitution established diversity jurisdiction to prevent discrimination in state courts against those not citizens of the state but felt that unless state law was applied in federal courts sitting solely on grounds of diversity of citizenship, discrimination against citizens of the state by non-citizens would be the result in federal courts. *Id.* at 74-77.

[46] 337 U.S. 535 (1949).

[47] *Id.* at 538. Note that the decision of the district court which was reinstated by the Supreme Court was based on the Mississippi statute rendering contracts of unqualified corporations in Mississippi void. *Woods*, 337 U.S. at 536. Since Mississippi has enacted § 247, however, an unqualified foreign corporation now has a valid claim for relief but is simply denied access to the courts to enforce that claim. *See supra* note 38 and accompanying text.

[48] Model Business Corp. Act (1960).

legal forum, and, thus, provided that uncertified foreign corporations conducting intrastate business could become domesticated at any time by paying past due and current certification fees.[49] Under the Model Act, once the foreign corporation complied with the state's certification requirements, its domesticated status would relate back to the commencement of the corporation's intrastate activities.[50] Thus, the foreign corporation would have complied with the state's regulatory scheme and would have acquired a judicial forum in which to press its claims.[51]

This balanced approach toward foreign corporations was upset by the *Parker* court;[52] although Mississippi retained the right to force a foreign corporation engaged in intrastate business to tender to the state all past due fees,[53] the payment did not relate back to the time such intrastate activity commenced.[54] An unqualified foreign corporation has been denied a forum within which to litigate any cause of action that accrued prior to compliance with Mississippi's certification provision.[55] Therefore, if a cause of action accrues prior to compliance with the certification statute, and the corporation's activity fails to fall within an exception to that statute, the corpration is denied access to the state court system to pursue its claim.[56]

---

[49] *See id.* at §§ 95, 124. The effect of a foreign corporation complying with a state's conditions prerequisite to the transacting of business within that state is that the corporation becomes entitled to all the rights, privileges and responsibilities of a domestic corporation, one originally chartered in that state. 17 W. FLETCHER, *Fletcher Cyclopedia Corporations* § 8304 (perm. ed. 1877).

[50] *See* MODEL BUSINESS CORP. ACT at §§ 116.

[51] *Id.*

[52] *See supra* notes 11-15 and accompanying text (foreign corporation must have qualified when cause of action accrued).

[53] *See supra* notes 49-51 and accompanying text.

[54] *Parker*, 197 So. 2d at 230. The court stated that allowing a corporation in violation of the certification statute to certify retroactively when deemed necessary *by the corporation* would be contrary to the purpose of the statute. *Id.* (emphasis added).

[55] *See supra* note 14.

[56] *See supra* notes 4-14 and accompanying text. The certification statute lists the following as activities not constituting the transaction of business in Mississippi:

> (a) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes.
>
> (b) Maintaining bank accounts.
>
> (c) Maintaining offices or agencies for the transfer, exchange and registra-

The most frequently used exception to the certification requirement has been the interstate commerce exception.[57] The Mississippi Supreme Court has broadly construed the state's power to regulate interstate commerce[58] and has rigidly applied the door-closing statute[59] in a manner possibly contrary to the federal commerce power.[60]

In *Pittman v. Allenberg Cotton Co.*, [61] the tension between the state and federal court concepts concerning the type of ac-

---

tion of its securities, or appointing and maintaining trustees or depositories with relation to its securities.

(d) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this state before becoming binding contracts.

(e) Transacting any business in interstate commerce.

(f) Conducting an isolated transaction completed within a period of thirty days and not in the course of a number of repeated transactions of like nature.

(g) Investing in or acquiring, in transactions outside of Mississippi, royalties and other non-operating mineral interests, and the execution of division orders, contracts of sale and other instruments incidental to the ownership of such non-operating mineral interests.

MISS. CODE ANN. § 79-3-211 (1972).

[57] *See supra* notes 4, 5, 7, 10, 15 and accompanying text.

[58] The Mississippi Supreme Court in Trane Co. v. Taylor, 295 So. 2d 746, 750 (1974), articulated a two-level test for determining when the interstate commerce exception applies. The first level asks whether the requirements of the certification statute are unduly burdensome on the foreign corporation. *Id.* If not, requiring compliance is proper; however, if compliance is unduly burdensome, the second level of the test asks whether the foreign corporation is engaged in interstate commerce. *Id.* If the corporation is doing interstate business, requiring compliance runs contrary to the federal commerce power; if not, the business is intrastate and the state may regulate it. *Id.* This decision appears to represent the adoption of a "balancing test" approach toward the problem of state interference with interstate commerce with regard to barring foreign corporations from state courts. *See* Note, *State Regulation of Foreign Corporations: Qualifications: Interstate v. Intrastate Business: Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U.S. 276 (1961)*, 47 CORNELL L.Q. 300, 302-03 (1962)(noting that balancing test not adopted by federal courts concerning burden imposed by qualification statutes on interstate commerce). *Cf.* Linton & Co. v. Robert Reid Engineers, Inc., 504 F. Supp. 1169, 1173 (M.D. Ala. 1981)(unqualified corporations doing business in Alabama barred from bringing suit unless (1) the foreign corporation was doing business in Alabama and (2) refusal to allow suit would hinder interstate commerce).

[59] *See* S & A Realty Co. v. Hilburn, 249 So. 2d 379, 381 (Miss. 1971)(certification statute should be strictly construed); Alabama Live Poultry, Inc. v. Ervin, 246 So. 2d 915, 917 (Miss. 1971)(certification statute designed to punish unqualified foreign corporations doing business in Mississippi).

[60] *See supra* notes 4, 5 and accompanying text.

[61] 276 So. 2d 678 (Miss. 1973), *rev'd*, 419 U.S. 20 (1970).

tivity that constitutes interstate commerce with respect to the certification statute became apparent. Allenberg, a Tennessee corporation, filed suit in state court seeking to enforce its contract to purchase cotton produced by Pittman. Pittman raised as a defense the bar to the corporation's right to maintain the suit created by the door-closing statute.[62]

The trial court found that Allenberg was not engaged in business in Mississippi within the meaning of the certification statute and entered a judgment for the corporation.[63] Pittman appealed.[64] In support of the trial court's findings, Allenberg argued that its activites in Mississippi were interstate in nature.[65] The Mississippi Supreme Court rejected the interstate commerce argument finding that the entire business relationship between Allenberg and Pittman was completed in the state and that whatever plans Allenberg had for the goods after completion of the Mississippi transaction were irrelevant.[66] Judgment for Allenberg was reversed by the Mississippi Supreme Court.[67]

The United States Supreme Court, however, reversed the state supreme court,[68] concluding that Mississippi's refusal to enforce the contract burdened interstate commerce.[69] Acknowledging that Allenberg's transaction with Pittman was completed in Mississippi upon delivery of the cotton, the Court nonetheless viewed the transaction as an integral part of interstate commerce.[70] The Court held that Allenberg's activities within Mis-

---

[62] *Id.* at 681; *see* MISS. CODE ANN. § 5309-221 (1942)(*recodified* at MISS. CODE ANN. § 79-3-247 (1972)(the "door-closing statute")).

[63] *Allenberg*, 276 So. 2d at 680.

[64] *Id.* at 681.

[65] *Id.*

[66] *Id.* at 681-82. All transactions between Allenberg and Pittman occurred in Mississippi. *Id.* at 681.

[67] *Id.* at 682.

[68] 419 U.S. 20 (1974).

[69] *Id.* at 29.

[70] *Id.* at 27. The Court analogized the cotton production marketing system with the meat marketing system discussed in Swift & Co. v. United States, 196 U.S. 3756 (1905), where the Court ruled that regulation of that system fell within the ambit of the federal commerce power once it had entered the "stream of commerce." *Allenberg*, 419 U.S. at 265-66. In a case which was very similar to *Allenberg*, a Kentucky farmer's contract to sell grain to a foreign corporation which had not qualified to do business in Kentucky was found to be "within interstate commerce." Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 292 (1921).

sissippi were not sufficiently "localized" to constitute intrastate commerce.[71]

The Mississippi Supreme Court has not strictly applied the "localized" business standard set forth in *Allenberg* in determining when a foreign corporation has transacted intrastate business so as to be barred from maintaining a suit in the courts of the state.[72] In *Trane Company v. Taylor*,[73] the court construed the interstate commerce exception to the foreign corporation certification requirement such that if a foreign corporation was found to have transacted intrastate business, then it was immaterial that the business was interstate in nature unless it could be shown that application of the certification statute would have unduly burdened the interstate business.[74] Under *Allenberg*, however, once a foreign corporation's business has been determined to be of an interstate character, the application of sanctions for failure to comply with a state certification statute would be prohibited.[75] Thus, there should be no additional inquiry into the degree of burden imposed on interstate commerce.[76] The Mississippi Supreme Court subsequently held in *Barbee v. United Dollar Stores, Inc.*,[77] that foreign corporations which were "doing business" in Mississippi within the meaning of the certification statute were not exempt from sanctions

---

[71] *Allenberg*, 419 U.S. at 33. The Court listed several "localizing" characteristics which it used in determining whether the operations of a given business were intrastate in nature. *Id.* These included asking whether the company's employees operated within the state on a regular basis, whether the company operated its own warehouse within the state, and whether it maintained the presence of its officers within the state. *Id.* Allenberg, having only some of these characteristics, was held not to be engaged in intrastate commerce. *Id. Accord* Diversacon Indus., Inc. v. National Bank of Commerce, 629 F.2d 1030, 1033 (5th Cir. 1980)(comparing "localized" business with furtherance of interstate business).

[72] *See* Barbee v. United Dollar Stores, Inc., 337 So. 2d 1277, 1279 (Miss. 1976)(Mississippi court picked up on the Court's "fleeting events" integrally tied to a national marketing business rationale in *Allenberg* rather than the "degree of localization" standard set by the Court for business.) *But cf.* Diversacon, Indus. Inc. v. National Bank of Commerce, 629 F.2d 1030, 1033 (5th Cir. 1982)(federal court sitting as state court applied *Allenberg* standard of localized activities).

[73] 295 So. 2d 746 (Miss. 1974).

[74] *Id.* at 75; *see supra* note 58 and accompanying text.

[75] *Allenberg*, 419 U.S. at 36.

[76] *Id.* at 34-35; *see supra* note 58 and accompanying text.

[77] 337 So. 2d 1277 (Miss. 1976).

merely because they conducted some limited interstate business.[78] The *Barbee* court limited *Allenberg* to its facts by concluding that only when goods were acquired with the intent of distributing them in interstate commerce would the interstate exception to the certification statute apply.[79]

The Mississippi Supreme Court should overrule *Parker* and permit foreign corporations to use the state court system even where they comply with the certification statute only after the accrual of a cause of action.[80] Such a ruling would diminish the possibility of potential conflict with the federal courts based on decisions such as *Barbee* which arguably are contrary to the federal commerce power as interpreted by the United States Supreme Court in *Allenberg*.[81]

IV. The Potential Effect of the Mississippi Rules of Civil Procedure

The Mississippi Supreme Court could leave *Parker* intact and still achieve closer compliance with constitutional mandates by using the Mississippi Rules of Civil Procedure to mitigate the harshness of the door-closing statute.[82] Because the rules only took effect in 1982, however, their actual impact on the door-closing statute remains uncertain.[83]

Rule 9(a) of the Mississippi Rules of Civil Procedure requires that a challenge to the capacity of a plaintiff be raised in the defendant's answer.[84] Some jurisdictions hold that the fail-

---

[78] *Id.* at 1279. The court concluded that the degree to which Dollar General controlled the intrastate functioning of its franchised outlets, stocking stores, personnel decisions, and ad campaigns brought it into the intrastate classification. *Id.* at 1278-79.

[79] *Id.* at 1279. The court found that the transactions in *Allenberg* were merely a "segment" of a larger interstate system of commodity distribution. *Barbee*, 337 So. 2d at 1279.

[80] *See supra* notes 13-14 and accompanying text.

[81] *See supra* notes 4, 7, 10, 61-78 and accompanying text.

[82] *See supra* text accompanying notes 52-56 (state court interpretations of Miss. Code Ann. § 79-3-247 (1972) place heavy burden upon interstate commerce).

[83] *See Order Adopting the Mississippi Rules of Civil Procedure, reprinted* in Miss. R. of Ct. 205, 206-20 (West 1983)(Bowling, Broome, Lee, dissenting)(rules effective as of January 1, 1982).

[84] Miss. R. Civ. P. 9(a). The rule states that the issue of the capacity of a party to sue must be raised in one's initial pleadings. *Id. See also* Miss. R. Civ. P. 8(c)(defendant must file answer to complaint filed against him).

ure of a foreign corporation to qualify to do business in the state can be the basis of a challenge to the corporation's capacity to sue.[85] If the Mississippi Supreme Court rules that failure of a foreign corporation to comply with the door-closing statute constitutes incapacity within the meaning of Rule 9(a), the court should then hold that the defense of the door-closing statute will always be waived unless the defendant raises it in his answer.[86]

Alternatively, the court could choose to limit the harshness of the door-closing statute through the application of Rule 8(c).[87] The court has already recognized that the door-closing statute should be raised as an affirmative defense.[88] Rule 8(c) now expressly requires that any matter constituting an affirmative defense be raised in the defendant's answer.[89] Therefore, the court could deem the defense of the door-closing statute

---

[85] *See, e.g.*, Sponaugle & Sons, Inc. v. McKnight Constr. Co., 304 A.2d 339, 342-43 (Del. Super. Ct. 1973)(issue of whether corporation has status to litigate is question of capacity); Dairy Equip. Co. v. Boehme, 92 Idaho 301, 442 P.2d 437, 439-440 (1968)(noncompliance with Idaho door-closing statute does not invalidate contract but merely goes to corporation's capacity to sue).

[86] *See, e.g.*, Shaw Supply Co., Inc. v. Morgan, 48 Idaho 412, 282 P. 492, 493 (1929)(objection to corporation's failure to qualify to do business raises issue of capacity and is waived unless raised in answer); Sponaugle & Sons, Inc. v. McKnight Constr. Co., 304 A.2d 339, 342-43 (Del. Super. Ct. 1973)(failure of defendant to allege in answer lack of corporate capacity constitutes waiver of defense).

Similarly, the court in West Publishing Co. v. Intrastate Pipeline Co., 254 So. 2d 643, 645 (La. Ct. App. 1968), denied a motion to dismiss the claim of a corporation not qualified to do business because the motion was not timely raised. The court reasoned that, since state law allowed a corporation to reinstate a claim dismissed for noncompliance with the door-closing statute after subsequently qualifying to do business, an objection to such noncompliance was in the nature of a dilatory matter. *Id.* The court stated that because state law required a dilatory motion to dismiss to be made prior to answer or default, the defendant waived the defense of the plaintiff's incapacity by failing to raise the issue until after it answered. *Id.*

[87] Miss. R. Civ. P. 8(c).

[88] *See* Trane Co. v. Taylor, 295 So. 2d 746, 747 (Miss. 1974)(defendant raised corporation's noncompliance with statute in answer). In Ross Constr. Co., Inc. v. U. M. & M. Credit Corp., 214 So. 2d 822, 824 (Miss. 1968), the Mississippi Supreme Court allowed the defendant to amend his answer to include the affirmative defense of the door-closing statute.

However, since Rule 8(c) explicitly requires that affirmative defenses be raised in the answer, it is possible that the court today would hold that failure to assert § 79-3-247 (1972) in the defendant's answer constitutes waiver. *See* Miss. R. Civ. P. 8(c).

[89] Miss. R. Civ. P. 8(c)

waived whenever the defendant failed to raise it in his answer.[90]

The Mississippi Supreme Court should also make clear that the door-closing statute does not bar a foreign corporate defendant from asserting counterclaims against the plaintiff.[91] The door-closing statute states that an unqualified corporation should not be prevented from defending *any* action in any Mississippi court.[92] The Mississippi Supreme Court should follow the decision of the United States Court of Appeals for the Fifth Circuit in *Environmental Coatings, Inc. v. Baltimore Paint and Chemical Company*, where that court construed the Mississippi door-closing statute to permit defendants to present compulsory counterclaims and third-party complaints.[93] In any event, regardless of whether the court characterizes the defense of the door-closing statute as raising a Rule 9(a) question of capacity or a Rule 8(c) affirmative defense, the defendant always bears the burden of proving that the plaintiff is a foreign corporation doing business in the state without a certificate of authority.[94]

---

[90] *See, e.g.*, Amerco Field Office v. Onoforio, 22 Ill. App. 3d 589, 317 N.E.2d 596, 600 (1974)(failure of corporation to qualify to do business is defense which is waived unless raised by defendant at earliest opportunity). *But see* Elsberry Equip. Co. v. Short, 63 Ill. App. 2d 336, 211 N.E.2d 463, 471 (1965)(failure of foreign corporation to qualify may be raised by court on its own motion or at any time during course of trial).

[91] *See, e.g.*, Lake States Eng'r Corp. v. Lawrence Seaway Corp., 15 Mich. App. 637, 167 N.W.2d 320, 325 (Mich. Ct. App. 1969)(when defendant puts the party's entire relationship in issue by raising counterclaim, foreign corporation allowed to use defensively whatever claims it has against defendant); Workman v. Griffin, 39 Mont. 1916, 651 P.2d 998, 1000 (1982)(foreign corporation can raise counterclaim because not instituting suit, rather merely defending action brought against it); American Bldgs. Co. v. White, 640 S.W.2d 569, 575 (Tenn. Ct. App. 1982)(foreign corporation can claim a set-off because it could cure its noncompliance and then file suit). *But see* Kiltka v. Temporaries, Inc., 568 F. Supp. 1527, 1532 (S.D. Tex. 1983)(failure to obtain certificate of authority precludes granting relief on counterclaim); Hightower Petroleum Corp. v. Stron, 236 S.W.2d 679, 680 (Tex. Civ. App. 1951)(same).

[92] MISS. CODE ANN. § 79-3-247 (1972)(emphasis added)("[t]he failure of a foreign corporation to obtain a certificate of authority to transact business in this state shall not . . . prevent such corporation from defending any action, suit or proceeding in any court of this state").

[93] 617 F.2d 110, 111 (5th Cir. 1980)(per curiam). The Fifth Circuit reasoned that the Mississippi legislature did not intend to deny the defendant the right to assert counterclaims since the law expressly permitted defense of claims against unqualified foreign corporations and did not mention counterclaims. *Id.* at 112.

[94] Mid-Continent Refrigerator Co. v. Starks, 298 So. 2d 714, 714 (Miss. 1974). In *Starks*, the court denied a motion to dismiss for failure of the corporate plaintiff to comply with the door-closing statute because the defendant offered no proof in support of

V. The Consequences of Compliance with the Door-Closing Statute

Given the Mississippi Supreme Court's less than benevolent attitude toward unqualified foreign corporations, those foreign corporations that anticipated conducting any business activity of an intrastate nature in Mississippi after *Parker* would be expected to comply with the certification statute or risk the loss of the right to unlimited use of the state courts.[95] Unfortunately, the number of cases reported in both the state and federal system involving unqualified foreign corporations in Mississippi has clearly established that *Parker* has not produced the level of compliance with certification that the court desired.[96] The apparent reason for this failure is that, since the courts cannot specify the activities which constitute intrastate activity,[97] foreign corporations, uncertain whether or not they need to become domesticated, may be choosing not to certify in order to avoid the fees and other responsibilities associated with compliance.[98] Another possible reason for this failure to certify might be that noncertification represents an attempt to avoid the effect of the process statute which provides that a domesticated foreign corporation's designated resident agent may be served process on behalf of the corporation.[99] The Mississippi Supreme Court has

---

his motion. *Id.*

[95] *See supra* text accompanying notes 26-31 (foreign corporation doing intrastate business precluded from enforcing cause of action accruing while unqualified).

[96] *See supra* note 15 and accompanying text (forum shopping used to avoid certification requirement).

[97] *See supra* notes 6-11 and accompanying text (Mississippi courts contrue intrastate business broadly).

[98] *See* Miss. Code Ann. § 79-3-247 (1972)(imposing duty on attorney general to sue unqualified foreign corporations transacting intrastate business for all fees due the state); *see also* Miss. Code Ann. § 79-3-249 (requirement that all corporations file annual report with State Tax Commission), § 79-3-257 (annual report fee $10 and late penalty $20), § 79-3-255 (maximum filing fee for articles of incorporation or amendments thereto $500), §§ 79-3-259 & 261 (penalties imposed upon corporations, directors, and officers). Foreign corporations might perceive that these requirements present too great a burden since, if the need should subsequently arise for a corporation to resort to the state courts for protection it could simply attempt to establish that its activity within the state fell within one of the § 79-3-211 exceptions to the certification requirement. *See supra* note 56.

[99] "The registered agent so appointed by a foreign corporation authorized to transact business in this state shall be an agent of such corporation upon whom any process,

not interpreted the process statute; however, the court has determined under predecessor statutes that a nonresident plaintiff can maintain an action in the courts of Mississippi against a domesticated foreign corporation that accrued in another forum.[100]

In *Pullman Palace Car Company v. Lawrence*,[101] Lawrence, a resident of Illinois, sued the Pullman Company (incorporated under the laws of Illinois) in the circuit court of Clairborne County on a cause of action that accrued outside of Mississippi.[102] Addressing the corporation's challenge to the circuit court's assumption of jurisdiction, the court found that if legal process could be served on a corporation in the state, it could be sued as could individual nonresidents who were found within the state and served with process.[103] The court did not indicate whether or not the corporation was either licensed to do business in Mississippi or actually doing business in the state.[104] Relying on the *Pullman* opinion, the court, in *Tri-State Transit Company v. Mondy*,[105] concluded that a Louisiana resident could use the Mississippi courts to sue a Louisiana corporation domesticated in Mississippi on a cause of action that arose in Louisiana since the corporation had a statutorily-appointed resident agent upon whom process was served in Mississippi and thus jurisdiction over the person of the corporation was ac-

---

notice or demand required or permitted by law to be served upon the corporation may be served. . . ." MISS. CODE ANN. § 79-3-229 (1972).

Failure of a foreign corporation to comply with § 79-3-211 might also be due to communications breakdowns within the corporate structure where it fully intended to comply with the statute but did not.

[100] Cowan v. Ford Motor Co., 694 F.2d 104, 106 (1982). The case involved a suit, brought against a nonresident corporation which had qualified to do business in Mississippi, based on a claim which arose in Texas. *Id.* at 105. The court ruled that § 79-3-229 gave the Mississippi courts jurisdiction over the case by relying on decisions interpreting previous versions of the statute. *Id.* at 105-06. *See, e.g.*, Poole v. Mississippi Publishers Corp., 208 Miss. 364, 377-79, 44 So. 2d 467, 473 (1950)(foreign corporations doing business in state subject to suit regardless of whether cause of action accrued in Mississippi); Tri-State Transit Co. v. Mondy, 194 Miss. 714, 724-25, 12 So. 2d 920, 921-22 (1943)(same).

[101] 74 Miss. 782, 22 So. 53 (1897).

[102] *Id.* at 789-90, 22 So. at 53-54.

[103] *Id.* at 801, 22 So. at 57.

[104] *Id.* at 796-801, 22 So. at 55-57.

[105] 194 Miss. 714, 12 So. 2d 920 (1943).

quired.[106] The court also noted that the corporation ran a bus line through Marion County;[107] however, there is nothing in the opinion to indicate that the court intended that a finding of Tri-State Transit's actual business activity within Mississippi was requisite to a finding that the trial court had properly acquired personal jurisdiction over the corporation, since the existence of business activity was mentioned with respect only to a state statute concerned with venue.[108]

The court partly clarified the ambiguity of whether a domesticated foreign corporation must actually be conducting intrastate business before a state court may validly exercise personal jurisdiction over it in *S&W Construction Company v. Douglas*.[109] A Tennessee resident sued S&W Construction (a Tennessee corporation authorized to do business in Mississippi) in the circuit court of Coahoma County, Mississippi on a cause of action that arose in Tennessee.[110] The court cited the *Pullman* opinion and stated that if a foreign corporation was qualified to do business in Mississippi, had designated a resident agent upon whom service of process could be made, and the agent had been properly served, then a Mississippi trial court would have jurisdiction over the corporation.[111]

---

[106] *Id.* at 724-25, 12 So. 2d at 921-22.

[107] *Id.* at 725, 12 So. 2d at 922.

[108] *Id.* at 724-25, 12 So. 2d at 921-22. The court made no attempt to expressly base its opinion on a finding that the defendant had conducted business activities in the state. *Id.*, 12 So. 2d at 921-22. *Cf. Ex parte* GTE Automatic Electric, Inc., 448 So. 2d 385, 386-87 (Ala. Civ. App. 1984)(foreign corporation qualified to do business in Alabama may be sued in any county where it is doing business).

[109] 224 Miss. 498, 142 So. 2d 33 (1962).

[110] *Id.* at 504-06, 142 So. 2d at 33-34.

[111] *Id.* at 506, 142 So. 2d at 34. The court never stated whether or not the corporation actually conducted business in Mississippi. *Id.*, 142 So. 2d at 34. It is possible that the court did not believe this to be relevant to the issue of jurisdiction. *See also* Anderson v. United States and Norfolk Dredging Co., 220 F. Supp. 769, 770 (E.D. Penn. 1963)(corporation qualified to do business in state subject to service of process and personal jurisdiction); Dombroff v. Eagle-Picher Indus., Inc., 450 So. 2d 923, 924 (Fla. Dist. Ct. App. 1984)(per curiam)(personal jurisdiction exists where foreign corporation's resident agent served); Augsbury Corp. v. Petrokey Corp., 97 A.D. 2d 173, 470 N.Y.S.2d, 787, 789 (N.Y. App. Div. 1983)(corporation consented to in personam jurisdiction by qualifying to do business in state); Price v. Wheeling Dollar Sav. & Trust Co., 460 N.E.2d 264, 269 (Ohio Ct. App. 1983)(having license to do business in state *per se* sufficient basis to assume personal jurisdiction). *See generally* FLETCHER, *supra* note 53, § 8311 (domesti-

The treatment accorded to qualified foreign corporations by federal courts sitting in Mississippi has been consistent with that of the Mississippi Supreme Court, but, arguably, a different analysis has been applied to reach the same result.[112] In *Cowan v. Ford Motor Company*,[113] the Fifth Circuit addressed the question of whether a nonresident could sue a domesticated foreign corporation on a cause of action that arose outside of Mississippi in federal court.[114] Relying on *S & W Construction Co. v. Douglas*,[115] the court held that Ford had consented to Mississippi's exercise of personal jurisdiction.[116] Unlike the foregoing Mississippi cases which authorized the exercise of personal jurisdiction solely on the basis that such corporations had qualified to do business in the state, the Fifth Circuit stated that jurisdiction was proper both because of qualification *and* the conducting of business within the state.[117] The court did not expressly state that both were essential to the proper exercise of jurisdiction, but this conclusion was implicit in the holding.[118]

A continued interpretation by the Mississippi Supreme Court of the process statute consistent with its previous decisions would effectively give the Mississippi courts personal juris-

---

cated foreign corporation should be treated as domestic corporation for purposes of personal jurisdiction).

[112] *See infra* notes 113-118 and accompanying text.

[113] 694 F.2d 104 (5th Cir. 1982).

[114] *Id.* at 105. Jurisdiction was based on diversity of citizenship; therefore, Mississippi substantive law was applicable to the case. *Id.*

[115] *See supra* notes 109-11 and accompanying text.

[116] 694 F.2d at 107.

[117] *Id.* (emphasis added). The court, although recognizing that jurisdiction was not based on a long-arm statute, nonetheless applied the due process standard of minimum contacts to § 79-3-229, which apparently led the court to base personal jurisdiction on more than the fact of domestication by also relying on the actual conducting of substantial intrastate business in Mississippi. *Id.*; *see also In re* Mid-Atl. Toyota Antitrust Litig. 525 F. Supp. 1265, 1278 and n.10 (D.Md. 1981)(consent to jurisdiction under qualification statute in the state since consent statutes necessarily incorporate the due process minimum contacts requirement); Plumb v. Cottle, 492 F. Supp. 1330, 1335 (D. Del. 1980)(actual conduct of business activities within a state allows courts to exercise personal jurisdiction without offending due process); Springle v. Cottrell Eng. Corp., 40 Md. App. 267, 287, 391 A.2d 456, 468 (Md. Ct. Spec. App. 1978)(compliance with qualification statute alone insufficient to vest personal jurisdiction, minimum contacts doing business also required).

[118] *See* 694 F.2d at 107.

diction over any conceivable cause of action against these corporations regardless of origin.[119] It is, of course, impossible to be certain of the result when the supreme court next considers this issue, but a prediction is possible based both on the foregoing decisions and on the decision rendered by the Mississippi Supreme Court in *Administrators of Tulane Ed. Fund v. Cooley*.[120] This case involved a quasi-in-rem attachment action brought in Mississippi based on a cause of action which accrued against Tulane University in Louisiana.[121] In ruling that the state possessed personal jurisdiction over the case, the court relied on the "minimum contacts" standard first enunciated by the United States Supreme Court in *International Shoe Co. v. Washington*.[122] This standard permits personal jurisdiction over a nonresident defendant only where the defendant has "certain" minimum contacts . . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[123] Justice Robertson, writing for the court in *Cooley*,

---

[119] *See supra* note 111 and accompanying text. While the Model Business Corporations Act contains a comparable provision to § 79-3-229, § 108 in the 1960 Act, the commentary does not anticipate the specific problem of whether or not a state court should exercise personal jurisdiction over a domesticated corporation on a claim that arose outside the state in favor of a nonresident plaintiff. *See* MODEL BUSINESS CORP. ACT § 108 (1960).

The likelihood that domesticated foreign corporations might frequently have to defend suits instituted against them by nonresident plaintiffs in the courts of this state on claims that arose outside of Mississippi is enhanced by the state's six-year statute of limitations. *See, e.g.*, Cowan v. Ford Motor Co., 694 F.2d 104, 107 (5th Cir. 1982)(nonresident plaintiff allowed to file suit in Mississippi to take advantage of six-year statute of limitations); Schreiber v. Allis Chalmers Corp., 611 F.2d 790, 794 (5th Cir. 1979)(same); *cf.* Dombroff v. Eagle-Picher Indus., Inc., 450 So. 2d 923, 924 (Fla. Dist. Ct. App. 1984)(per curiam)(personal jurisdiction exists even if corporation not domesticated until after cause of action accrues where domesticated before statute of limitations runs). *But cf.* Stavang v. American Potash & Chem. Corp., 227 F. Supp. 786, 787 (S.D. Miss. 1964)(where corporation qualified to do business in state after cause of action accrued to a nonresident plaintiff outside of forum state, no personal jurisdiction exists).

[120] 462 So. 2d 696 (1984).

[121] *Id.* at 698-99. The plaintiff in this action had successfully attached $48,182.00 owed to Tulane arising out of a football game between Tulane and the University of Southern Mississippi, along with $99,495.50 owed to Tulane by virtue of Tulane's medical treatment of plaintiff's decedent. *Id.* at 698. These funds were within the state of Mississippi. *Id.*

[122] 326 U.S. 310, 316 (1945).

[123] *Id.* In determining whether or not "minimum contacts" exist, a court is required to focus its attention on the relationship among the defendant, the forum, and the litiga-

stressed that all Mississippi state courts would hereafter be required to apply this "minimum contacts" test in order to determine whether they had jurisdiction over the res involved in a quasi-in-rem action or jurisdiction over *any nonresident* defendant in an in personam action.[124]

In view of the *Cooley* requirement of "minimum contacts," it would appear unlikely that the Mississippi Supreme Court would again rule that personal jurisdiction exists over a domesticated nonresident corporation doing no business in Mississippi.[125] The "minimum contacts" standard would thus effectively limit the ability of the state's courts to assert jurisdiction despite the apparent power conferred by the process statute under the supreme court's previous decisions.[126]

IV. CONCLUSION

The attitude of the Mississippi Supreme Court toward foreign corporations has been hostile and discriminatory. The original purpose of federal diversity jurisdiction was to avoid poten-

---

tion. Shaffer v. Heitner, 433 U.S. 186, 204, 207 (1977). Additionally, the United States Supreme Court has stated that a defendant must have purposely availed himself of the privilege of conducting activities in a state in order to be subjected to in personam jurisdiction by that state. Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

[124] *Cooley*, 462 So. 2d at 704; *accord In re* Mid-Atl. Toyota Antitrust Lig., 525 F. Supp. 1265, 1278 n.10 (D. Md. 1981)(consent to jurisdiction under qualification statute meaningless where corporation did no business in state); Plumb v. Cottle, 492 F. Supp. 1330, 1335 (D. Del. 1980)(actual conduct of business activities within state allows courts to exercise personal jurisdiction without offending due process); Springle v. Cottrell Eng. Corp., 40 Md. App. 267, 287, 391 A.2d 456, 468 (Md. Ct. Spec. App. 1978)(compliance with qualification statute alone insufficient to vest personal jurisdiction absent minimum contacts).

[125] *See supra* notes 115-16 and accompanying text. A domesticated foreign corporation owning property in Mississippi would probably be more amenable than a corporation owning no such property since the United States Supreme Court has stated that there are some cases where the presence of the property alone would be sufficient to establish the "minimum contacts." Shaffer v. Heitner, 433 U.S. 186, 207-08 (1977). The Mississippi Supreme Court has interpreted this portion of the opinion in Shaffer to mean that there is no requirement that there be a direct relationship between property which is seized and the litigation in an action. Cooley, 462 So. 2d at 703. *Compare* Abbott, *Provisional and Final remedies and Special Proceedings-Rules, Symposium on Mississippi Rules of Civil Procedure*, 52 MISS. L. J. 183, 184-85 (1982)(Shaffer v. Heitner as requiring nexus between property seized and underlying claim in quasi in rem actions).

[126] *See supra* notes 101-111 and accompanying text.

tial partisanship in favor of state residents and against nonresidents in state courts;[127] however, the Mississippi Supreme Court has construed section 79-3-247 in such a way that the constitutional purpose for diversity jurisdiction has been undercut.[128] It could be argued that the effect of the *Parker* decision on the door-closing statute is to deny foreign corporations access to the federal courts and that this restricts the constitutionally vested diversity jurisdiction of federal courts and is unconstitutional.[129]

The court's attitude toward foreign corporations has colored its perception of interstate commerce. The court has intentionally applied a less stringent standard to the interstate commerce exception to the Mississippi certification statute than that mandated by the United States Supreme Court.[130] It appears likely that the continuance of this narrow construction of the interstate commerce exception by the Mississippi Supreme Court will eventually result in a successful challenge by a foreign corporation to the door-closing statute as an impermissible violation of the commerce clause of the federal constitution.[131] Such a result could be prevented, however, if the court were to overcome its apparent prejudice against foreign corporations by overruling *Parker* and allowing subsequent compliance with the certification statute to remove the bar against suits based on causes of action that accrued prior to compliance.[132]

Regarding the process statute, the Mississippi Supreme Court has not affirmatively stated its position regarding the use of the statute to obtain personal jurisdiction over foreign corporations on claims that accrued outside the state in favor of a nonresident,[133] but it is doubtful that the Mississippi Supreme Court would rule that personal jurisdiction existed over a domesticated foreign corporation doing no business in Missis-

---

[127] *See supra* note 45.

[128] *See supra* notes 43-47 and accompanying text.

[129] *See supra* notes 52-81 and accompanying text.

[130] *See supra* text accompanying notes 61-79.

[131] *See supra* notes 80, 81 and accompanying text.

[132] *See supra* notes 32-34.

[133] *See supra* note 100 and accompanying text.

sippi.[134] To clarify the rights and obligations of such corporations, however, it would be good if the Mississippi Supreme Court were to make a definitive ruling that personal jurisdiction could not be asserted over a foreign corporation, even if domesticated, absent sufficient "minimum contacts" with the state.[135] This would support the conclusion that the courts of Mississippi are now willing to follow binding federal precedents—any other result would almost certainly be overturned by the United States Supreme Court anyway.[136]

---

[134] *See supra* text accompanying notes 125-26.
[135] *See supra* text accompanying notes 119-24.
[136] *See supra* note 123.

Mississippi Law Journal

Published by Students at the University of Mississippi School of Law

VOLUME 55 JUNE 1985 NUMBER 2

EDITORIAL BOARD

Editor-in-Chief
RALPH CALHOUN BRASHIER, JR.

Assistant Editor
HOLLY L. HUGGINS

Business Manager
MERRIL BINFORD WILLIAMS, JR.

Associate Editor—Articles
VICTOR SCOTT WILLIAMS

Associate Editor—Comments
SALLY BASKIN BUNTIN

Research Editors
LEWIS W. BELL
ANN FORTENBERRY CORSO
WEYMAN W. MCCRANIE, JR.
GEORGE H. RITTER
G. KAY LORD TRAPP
DIANE WITTENBERG

Casenote Editors
PETER C. ABIDE
DIANNE RILEY JOHNSON

Administrative Assistants
SHERRY SANTINA
CINDY WARD

Associate Editor—Casenotes
A. CAMILLE HENICK

Associate Editor—Mississippi Cases
H. RICHMOND CULP III

Articles Editors
MICHAEL CRUSE CORSO
MICHAEL GWIN
LAURIE MADDOX
LINDSAY COATES PATTERSON

Index and Review Editors
PAULA GRAVES
JOSEPH HENRY ROS

Managing Editor
CHERI D. GREEN

Special Projects Editor
MARY CAROLE BRAND

Faculty Advisors
GUTHRIE T. ABBOTT
DEBORAH H. BELL

STAFF

REBECCA RAINEY BELL
JOLI E. BOARDMAN
BRAD CATT
DAVID CALDER
MICHAEL D. CHASE
ANN H. DENNEY
BOBBY FISHER, JR.
RICK GIBSON
KEITH T. HILL
NOEL VICTORIA HOLLADAY
MARK MALLERY
CAREN POWELL
CURT PRESLEY
WILLIAM F. RAY
JOHNSON RICE
PAMELA WESCOVICH ROBERTS
JOHN W. SIMMONS
LEE CAGLE SMITH
JOHN T. SPARKS
WILLIAM C. STENNETT
SHAWN N. SULLIVAN
DON WENDLAND
KATIE W. WOOD

COMMENTS

AKE V. OKLAHOMA: AN INTERLOPER IN THE BRAVE NEW WORLD OF THE 1984 INSANITY DEFENSE REFORM ACT CHALLENGES FEDERAL RULE OF EVIDENCE 704(b)

I. INTRODUCTION

The Stage Is Set: Congressional Design Versus Constitutional Mandate

The Insanity Defense Reform Act of 1984[1] brings sweeping changes to the federal courts.[2] The Act designates insanity as an affirmative defense, defines the insanity standard solely in cognitive terms and shifts to the defendant the burden of proving by clear and convincing evidence the defense of insanity.[3] Further, the Act amends Rule 704 of the Federal Rules of Evidence to bar an expert from giving opinion testimony concerning the mental state of a defendant as it relates to an element of the crime or to a defense thereto, thereby reserving resolution of such ultimate legal issues for the trier of fact.[4] The

---

[1] Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2057 (to be codified at 18 U.S.C. § 20). The Act became effective October 12, 1984. Continuing Appropriations, 1985-Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837.

[2] *See* Stengel, *More Muscle for Crime Fighters, Time*, Oct. 29, 1984, at 74 (federal criminal code comprehensively reworked but impact limited because state courts have jurisdiction for 95% of cases involving violent crime).

[3] Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, § 402(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2057, 2057 (to be codified at 18 U.S.C. § 20). For the specific statutory language of § 402(a), see *infra* text accompanying note 124.

[4] Insanity Defense Reform Act § 406, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2057, 2067-68 (amending FED. R. EVID. 704). The Insanity Defense Reform Act further amended Federal Rule of Criminal Procedure 12.2 *Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition.* Insanity Defense Reform Act § 404, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2057, 2067, *repealed in part by* Criminal Fine

scope of the Act also includes commitment procedures for a defendant who successfully pleads not guilty only by reason of insanity.[5]

This comment will first examine the judicial development of the insanity defense in the federal courts, with particular emphasis on the recent Fifth Circuit decision *United States v. Lyons*.[6] Next, through juxtaposition of the judicial and legislative treatments of the allocation of the burden of proof and the definition of the legal standards for the defense of insanity, this comment will focus on the close relationship and continuing tension between insanity and mens rea or criminal intent.[7] The final issue which this comment will address centers on the

---

Enforcement Act of 1984, Pub. L. No. 98-596, § 11(b), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3134, 3138.

[5] Insanity Defense Reform Act § 403, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2057, 2059-61 (to be codified at 18 U.S.C. § 4243); *see also* SENATE COMM. ON THE JUDICIARY, COMPREHENSIVE CRIME CONTROL ACT OF 1983, S. REP. No. 225, 98th Cong., 1st Sess. 240-45, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3404, 3422-27 [hereinafter cited as Senate Report].

[6] 731 F.2d 243 (5th Cir.), *cert. denied*, 105 S. Ct. 323 (1984).

[7] *See, e.g.*, Jones v. United States, 103 S. Ct. 3043, 3054 n.4 (1983)(Brennan, J., dissenting)(constitutional problems implicated by punishment of insanity acquittees whom society has viewed as neither blameworthy nor suitable to deterrence). Justice Brennan noted: "In addition, insanity and *mens rea* stand in a close relationship, which this Court has never fully plumbed. *See* Powell v. Texas, 392 U.S. 514, 536-37, 88 S. Ct. 2145, 2156, 20 L. Ed. 2d 1254 (1968)(opinion of Marshall, J.); Leland v. Oregon, 343 U.S. 790, 800, 72 S. Ct. 1002, 1008, 96 L. Ed. 1302 (1952); *cf.* Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975)." *Jones*, 103 S. Ct. at 3054 n.4.

Mens rea, or "guilty mind," is applicable in two contexts: first, the general concept of bad state of mind as a requisite for criminal responsibility, derived from the common-law crimes, and second, the narrower concept of specific intent, derived from modern statutory crimes. *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 27, at 191-95 (1972)(evolution of concept of mens rea from common-law background to modern statutory status); S. KADISH, S. SCHULHOFER & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 267-68 (4th ed. 1983)(mens rea in the general sense as compared with mens rea in special sense). The United States Supreme Court has not addressed mens rea as a general constitutional doctrine. Powell v. Texas, 392 U.S. 514, 535 (1968). However, the Court has recognized that, traditionally, criminal liability encompassed criminal intent. *See* Morissette v. United States, 342 U.S. 246, 250-52 (1952)(crime as implicating evil-meaning mind). As applied to the insanity defense, mens rea raises problems because criminal culpability has been traditionally viewed as broader than modern statutory mens rea and the defense of insanity operates as an excuse to preclude criminal liability through showing lack of malice, not merely lack of specific intent. *See* Hermann, *Assault on the Insanity Defense: Limitations on the Effectiveness and Effect on the Defense of Insanity*, 14 RUTGERS L.J. 241, 252-54 (1983)(illustration of distinction between insanity as it relates to statutory mens rea and as it relates to preclusion of criminal culpability).

Two Mississippi Supreme Court cases, each addressing insanity as a defense to murder, illustrate the dual concepts of mens rea. In the 1931 decision Sinclair v. State, 161 Miss. 142, 159-60, 132 So. 581, 584 (1931)(per curiam), Justice Etheridge, specially con-

potential conflict between the legislative amendment of Federal Rule of Evidence 704 in the Insanity Defense Reform Act and the judicial delineation of an indigent's right to psychiatric assistance in *Ake v. Oklahoma*.[8] In *Ake*, the United States Supreme Court mandated that competent psychiatric assistance must be provided an indigent defendant in evaluating, preparing, and presenting his defense.[9] The question, however, will be raised whether a psychiatrist can effectively assist in a defense if prohibited, under Rule 704(b), from giving any opinion concerning the requisite mental condition constituting a statutorily required element of the crime.

II. The Judicial Development of the Insanity Defense

A. The Legal Tests

The Federal Judiciary: Shadow Boxing with Criminal Responsibility and the Uneasy Silence

Prior to *United States v. Lyons*, four major developments in the search for the properly applicable test for legal insanity[10] had arisen

---

curring, discussed the role of intent in determining criminal responsibility and implicitly approved an analysis of insanity which focused on two aspects of criminal intent: intent and animus. The term "intent" related to reasoned awareness of the result of the criminal act whereas the term "animus" related to reasoned awareness of the act's being in contradiction to the law.

> A monomaniac may kill a man under the insane delusion that the man is an enemy who is about to kill him. Here there is an intent, as the monomaniac clearly understands, that the act will result in the victim's death; but there is a lack of animus, because he believes that he is justified, and that the act, therefore, is right in the sight of the law. It is clear, then, that where the mind of the perpetrator is so diseased as to exclude the presence of an intent or animus in the commission of the crime in question, he should not be punished as a criminal.

Sinclair, 161 Miss. at 160, 132 So. at 584 (Etheridge, J., concurring)(citing G. Smoot, The Law of Insanity 372-73 (1929)); *see also* Harvey v. State, 207 So. 2d 108, 110-11 (Miss. 1968)(criminal intent or mens rea necessary for criminal responsibility).

By contrast, in the 1983 decision *Groseclose v. State*, Justice Robertson, concurring, questioned the fictions created to manipulate the intent requirement and implicitly urged a major restructuring of the traditional insanity defense to provide that once it is established that the accused did the act with which he is charged, his insanity or mental state should be relevant only to disposition, not guilt or innocence. Groseclose v. State, 440 So. 2d 297, 305-06 (Miss. 1983)(Robertson, J., concurring).

[8] 105 S. Ct. 1087 (1985), *reversing* 663 P.2d 1 (Okla. Crim. App. 1983).

[9] *Ake*, 105 S. Ct. at 1097.

[10] *See* W. LaFave & A. Scott, *supra* note 7, § 36, at 269 (1972)(four definitions for insanity defense have been used); Comment, *Guilty But Mentally Ill: Broadening the Scope of Criminal Responsibility*, 44 Ohio St. L.J. 797, 801 (1983)(courts have used four

without any direct formulation of a standard by the United States Supreme Court.[11] The process of defining the insanity defense began in early English common law,[12] and the first touchstone appeared in the landmark 1843 decision, *M'Naghten's Case*.[13] The *M'Naghten* rule[14] dictated that to interpose the insanity defense one had to prove a "defect of reason, from disease of mind"[15] that resulted in an impaired

---

basic approaches).

[11] *See* Moore, *M'Naghten Is Dead—Or Is it?*, 3 HOUS. L. REV. 58, 59-60 (1965)(Supreme Court appears to be waiting for circuits to develop acceptable rule as to insanity defense); Smith, *Limiting the Insanity Defense: A Rational Approach to Irrational Crime*, 47 MO. L. REV. 605, 607 (1982)(United States Supreme Court and Congress inactive in development of insanity defense).

[12] *See* Comment, *supra* note 10, at 801-02 (history and development of insanity tests). Many tests contained language comparing the behavior of defendants to wild beasts and using behavior of idiots and children as standards. *Id.* In particular, in an early English decision known as Hadfield's Case, 27 St. Tr. 1281 (1800), a directed acquittal was to be awarded by the jury if defendant was in "a deranged state of mind" at the time the act was committed and not "under the guidance of reason." *Id.* at 1354-55.

[13] 8 Eng. Rep. 781 (1843). M'Naghten shot and killed another man while "affected by morbid delusions." *Id.* at 719. He was acquitted on the basis of his claim of insanity. *Id.* at 720. The decision caused the House of Lords to pose five hypothetical questions to the Law Lords in order to set forth appropriate standards for the insanity defense. *Id.* The first question asked for a determination of the law as applied to persons suffering from insane delusions. *Id.* The second question concerned jury instructions where the issue was insane delusions. *Id.* Question three was phrased in general language and asked under what terms the jury should be left to determine the accused's state of mind. *Id.* The fourth question explored the consequences of a person's committing a crime while suffering from insane delusions and, finally, the fifth question addressed the role of expert testimony relating to admission of evidence. *Id.* For a discussion of the *M'Naghten* case, see generally W. LAFAVE & A. SCOTT, *supra* note 7, § 37, at 274-83.

[14] *M'Naghten*, 8 Eng. Rep. at 722. Of the fifteen justices, fourteen answered:

> [T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong.

Id. Note that one justice, in a separate opinion, found difficulty with the questions because they did not relate to a particular set of facts. *Id.* at 720-22.

[15] *Id.* at 722; *see also* H. FINGARETTE, THE MEANING OF CRIMINAL INSANITY 234-39 (1972)("defect of reason from disease of the mind" provided formula which stands as adequate test). While this terminology has never been fully defined, courts have attempted to clarify it in cases involving borderline mental conditions such as alcoholism and narcotic addiction. *See* A. GOLDSTEIN, THE INSANITY DEFENSE 47-49 (1967)(terminology generally presented without explanation as charge to jury). For an interpretation by the *Lyons* court of mental disease or defect as it relates to drug addiction, see *infra* note 62.

ability "to know"[16] either the "nature and quality"[17] of one's actions or that such actions were "wrong."[18] This rule has become known in the United States as the right-wrong test and has been interpreted as setting forth exclusively cognitive requirements.[19]

The second significant development of the insanity defense[20] was fully articulated in the case of *Parsons v. State*[21] and incorporated a new standard recognizing as an element of insanity the lack of ability to control one's behavior. In *Parsons*, the Alabama Supreme Court re-

---

[16] *M'Naghten*, 8 Eng. Rep. at 722. These words triggered the controversy that has surrounded *M'Naghten* because they implied that the test was solely cognitive; however, few courts which have addressed this issue have imposed this restrictive interpretation. A. GOLDSTEIN, *supra* note 15, at 49-50.

[17] *M'Naghten*, 8 Eng. Rep. at 722. These words have been broadly interpreted to go beyond mere intellectual understanding. A. GOLDSTEIN, *supra* note 15, at 50-51; *see* State v. Esser, 16 Wis. 2d 567, 115 N.W.2d 505, 521-22 (1962)(nature and quality of act important in comprehensive analysis of wrongfulness).

[18] *M'Naghten*, 8 Eng. Rep. at 722. Confusion has existed concerning whether this term referred to moral wrong or legal wrong. W. LAFAVE & A. SCOTT, *supra* note 7, § 36, at 278-79; *compare* State v. Andrews, 187 Kan. 458, 357 P.2d 739, 747 (1960)(standard is legal wrong) *with* People v. Schmidt, 216 N.Y. 324, 110 N.E. 945, 948-49 (1915)(moral wrong must be reflected in standard).

[19] *See* Groseclose v. State, 440 So. 2d 297, 302 & n.2, 303-04 & n.4 (Miss. 1983)(Robertson, J., specially concurring)(Mississippi follows *M'Naghten* right-wrong rule); Comment, *supra* note 10, at 803 (*M'Naghten* frequently criticized for emphasis on cognition only). Although *M'Naghten* has been criticized because of its emphasis on cognitive rather than volitional factors, commentators have suggested that the *M'Naghten* court actually provided for flexibility depending upon the circumstances of each case. Comment, *supra* note 10, at 803; *see also* Moore, *supra* note 11, at 63 (jury determined soundness of mind from looking at all evidence); A. GOLDSTEIN, *supra* note 15, at 53-54 (*M'Naghten* does not bar flow of evidence). For an example of judicial criticism of the narrowness *M'Naghten*, see United States v. Currens, 290 F.2d 751, 765-67 (3d Cir. 1961)(lack of modern psychiatric reality in right-wrong test); *accord* United States v. Freeman, 357 F.2d 606, 618-20 (2d Cir. 1966)(*M'Naghten* rule unrealistic in not recognizing degrees of incapacity and in limiting psychiatric testimony to analysis of knowing right from wrong). *See generally* Platt & Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CALIF. L. REV. 1227, 1256-57 (1966)(right-wrong test in use in American courts before 1843).

[20] *See* W. LAFAVE & A. SCOTT, *supra* note 7, § 38, at 283-84 (during 1860's and 1870's, irresistible impulse test began to be accepted).

[21] 81 Ala. 577, 2 So. 854 (1887). The earliest mention of a volitional test, recognizing as an important criterion the lack of ability to control one's behavior, was an 1834 Ohio decision. Comment, *supra* note 10, at 804 (citing State v. Thompson, Wright's Ohio Rep. 617 (1834)). The nomenclature "irresistibile impulse" was first used in 1844, but it was unclear whether the court was advocating a separate test from *M'Naghten*. W. LAFAVE & A. SCOTT, *supra* note 7, § 37, at 284 (citing Commonwealth v. Rogers, 48 Mass. 500 (1844)).

sponded to the overtly cognitive emphasis of *M'Naghten* by creating the irresistible impulse test, which recognized that criminal responsibility encompassed the defendant's will in addition to his intellect.[22] The irresistible impulse test encountered criticism because it could be limited to the narrow definition of a sudden impulse, foreclosing its use for mental illness that involved brooding and reflection.[23] In practice, however, most courts gave the *Parsons* test a broad interpretation emphasizing lack of control or choice.[24]

During the 1890's, the United States Supreme Court addressed certain integral aspects of the issue of insanity in two interrelated cases, both styled *Davis v. United States*.[25] The first *Davis* case resolved for the federal courts the burden of proof question as it related to the insanity defense.[26] The Court recognized that the prosecution is aided by the presumption of sanity but explained that where the accused produced some evidence to impair this rebuttable presumption, then the prosecution must prove the accused's sanity beyond a reason-

---

[22] *See Parsons*, 2 So. at 865-66 (*M'Naghten* rule no longer law because of its narrowness). Proper jury instructions included a series of questions. *Id.* at 866-67. First, did the disease of mind relate to idiocy or other insanity? If so, was the accused able to distinguish right from wrong, for without such knowledge, he was not accountable at law. Moreover, if he could know the right-wrong distinction, the accused was still not accountable if he had neither power to choose nor ability to avoid the criminal act which had to be solely the product of mental disease. *Id.; see* Carter v. United States, 325 F.2d 697, 708 n.4 (5th Cir. 1963)(Brown, J., joined by Wisdom, J., concurring specially in dissenting opinion of Bell, J.)(inadequacies of *Parsons* test accentuated by requirement that mental disease be sole cause of defendant's criminal actions), *cert. denied*, 381 U.S. 927 (1965).

[23] *See* Durham v. United States, 214 F.2d 862, 873-74 (D.C. Cir. 1954)(irresistible impulse test misleading in its connotation that act had to be sudden). Further criticism of this definition focused on the problem in proving whether an impulse was controllable or uncontrollable. W. LAFAVE & A. SCOTT, *supra* note 7, § 37, at 286. For a similar analysis in *United States v. Lyons* of the problem in assessing capacity for self-control, see *infra* notes 66-67 and accompanying text.

[24] *See, e.g.*, Lee v. State, 265 Ala. 623, 93 So. 2d 757, 759-60 (1957)(language used was whether defendant could resist criminal act); Castro v. People, 140 Colo. 493, 346 P.2d 1020, 1027 (1959)(irresistible impulse interpreted in terms of capacity to choose or refrain); *see also* A. GOLDSTEIN, *supra* note 15, at 69-75 (irresistible impulse interpreted in practical terms as lack of control); Smith, *supra* note 11, at 608 (more appropriate to refer to test as one recognizing control or volition rather than sudden impulse).

[25] 165 U.S. 373 (1897), 160 U.S. 469 (1895). In the earlier *Davis* case, the Court rejected the lower court's jury charges concerning burden of proof and presumption of sanity and reversed and remanded the defendant's murder conviction. *Davis*, 160 at 474-93. In the later *Davis* decision, the Court upon review of the second trial recited with approval the lower court's jury charge defining insanity. *Davis*, 165 U.S. at 378. For the specific language of the jury charge, *see infra* note 29.

[26] *See Davis*, 160 U.S. at 469, 485-91.

able doubt in order to find the accused criminally guilty of murder.[27] Moreover, the Court recognized that inherent in any evaluation of criminal responsibility was a consideration of the accused's will and his acts.[28] The Court in the second *Davis* case impliedly approved a test which further defined insanity arising from mental derangement by reference to two legal criteria: first, whether the accused lacked the capacity to distinguish right from wrong, and second, whether the acts of the accused were beyond the power of his control even though he might know the wrongfulness of his act.[29] The *Davis* cases blended the irresistible impulse test with the *M'Naghten* rule, synthesizing ability to control one's behavior with awareness of intellectual perceptions.[30]

Not until 1954 did a third major development emerge,[31] when the

---

[27] *Id.* at 486-91. The Court laid the foundation for any procedural analysis of the insanity defenses as follows:

> Strictly speaking, the burden of proof as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. Giving to the prosecution, where the defense is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question, from the time a plea of not guilty is entered until the return of the verdict, is whether upon all the evidence, by whatever side adduced, guilt is established beyond a reasonable doubt. If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged.

Id. at 487-88 (emphasis added).

[28] *Id.* at 484-85, 488.

[29] *Davis*, 165 U.S. at 378. The test originated from the Supreme Court's review of the second trial court's charge to the jury. *Id.* The Supreme Court approved the district court's definition of insanity:

> The term "insanity" as used in this defence means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing, or where, though conscious of it and able to distinguish between right and wrong and know that the act is wrong, yet, his will, by which I mean the governing power of his mind, has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control.

Id.

[30] *See* Carter v. United States, 325 F.2d 697, 704-05 (5th Cir. 1963)(Bell, Tuttle, Brown, Wisdom, JJ., dissenting)(integration of *M'Naghten* rule and irresistible impulse test in second *Davis* decision whereby cognition and volition were recognized), *cert denied*, 381 U.S. 927 (1965); Smith, *supra* note 11, at 607-08 n.9 (*Davis* added volitional standard of irresistible impulse to *M'Naghten*'s cognitive test).

[31] *See* Comment, *supra* note 10, at 804-05 (dissatisfaction with *M'Naghten* and irre-

United States Court of Appeals for the District of Columbia announced in *Durham v. United States*[32] a new rule for administering the insanity defense.[33] The *Durham* rule came to be known as the "product" test because the standard specified that criminal responsibility was a question of whether the criminal act was the "product of mental disease or defect."[34] The District of Columbia Circuit, building upon an earlier New Hampshire test for insanity,[35] criticized the *M'Naghten* and irresistible impulse rules[36] and proposed a standard that allowed broader psychiatric testimony and emphasized the importance of the jury's access to all available information in making its factual determination.[37] Subsequent decisions by the Court of Appeals for

---

sistible impulse prompted new test). The stage for change was set in 1953 when the Royal Commisison on Capital Punishment aired debate on the narrowness of the earlier tests and the need to respond to present psychiatric theories. A. GOLDSTEIN, *supra* note 15, at 80-82.

[32] 214 F.2d 862 (D.C. Cir. 1954).

[33] *Id.* at 874-75. The court stated that it was changing the rule because of the current psychiatric understanding of man as an integrated personality with reason being only one facet of that personality rather than the sole factor determining conduct. *Id.* at 871. The court in *Durham* was influenced by the report of the Royal Commission on Capital Punishment, which recommended abrogation of the insanity rules in favor of broad jury instructions or, alternatively, a proposal combining the *M'Naghten* and control tests. A. GOLDSTEIN, *supra* note 15, at 81-82 (citing Report of Royal Commission on Capital Punishment 111, 116 (1953)). Although these recommendations played an important role in the development of the insanity defense in the United States, neither of them was adopted in England. A. GOLDSTEIN, *supra* note 15, at 82.

[34] *Durham*, 214 F.2d at 874-75; *see* Dutile & Singer, *What Now For the Insanity Defense?*, 58 NOTRE DAME L. REV. 1104, 1106 (1983)(*Durham* established "product" test).

[35] W. LAFAVE & A. SCOTT, *supra* note 7, § 38, at 287. The New Hampshire decisions State v. Pike, 49 N.H. 399, 6 Am. Rep. 533 (1870), and State v. Jones, 50 N.H. 369, 9 Am. Rep. 242 (1871), are considered the forefunners of the *Durham* "product" test. W. LAFAVE & A. SCOTT, *supra* note 7, § 38, at n.2. The court in *Pike* stressed an analysis which would find a defendant without criminal responsibility if his action "was the offspring or product of mental disease." *Pike*, 6 Am. Rep. at 585. Moreover, the *Pike* court stated that the jury must determine whether the criminal act constituted mental distress. *Id. Jones* upheld a standard that would allow jurors full consideration of all the evidence, emphasizing that any insanity determination was ultimately a question of fact. *Jones*, 9 Am. Rep. at 243; *cf.* Comment, *supra* note 10, at 804-05 (substantive versus evidentiary analysis pointed out difference between *Durham* and New Hampshire decisions).

[36] *See Durham*, 214 F.2d at 869-71. The court characterized earlier tests as misleading. The D.C. Circuit criticized the right-wrong test because of its medically outdated emphasis on the cognitive standard and stressed as its major fault that it was a test defined by one particular symptom. *Id.* at 871-72. Moreover, the court faulted the irresistible impulse test because of its emphasis on "only sudden, monetary or spontaneous inclinations to commit unlawful acts." *Id.* at 873.

[37] *Id.* at 875-76. The court focused on the role of the jury in resolving ultimate ques-

the District of Columbia addressed criticism concerning lack of definition of the word "product"[38] and overemphasis of psychiatric evaluation that resulted in a faulty system of conclusory labels.[39]

In 1956, in *Howard v. United States*,[40] the Fifth Circuit Court of Appeals chose to reaffirm the *Davis* standard.[41] The Fifth Circuit's conclusion was to adopt an interpretation of the second *Davis* case made by an earlier District of Columbia Court of Appeals decision rather than to adopt the *Durham* rule espoused later by the same District of Columbia Circuit.[42] The court in *Howard* affirmed a two-pronged test of criminal responsibility wherein the applicability of the insanity defense turned upon the defendant's capacity to distinguish right from wrong and his ability to control his behavior.[43] Another in-

---

tions of fact by stating that "[o]ur collective conscience does not allow punishment where it cannot impose blame." *Id.* at 876 (quoting Holloway v. United States, 148 F.2d 665, 666-67 (D.C. Cir. 1945)).

[38] *See, e.g.*, McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962)(court sought to clarify "product" by definition of mental disease or defect which measured substantial effects on mental or emotional processes as well as behavioral controls); Carter v. United States, 252 F.2d 608, 617 (D.C. Cir. 1957)(court responded to vagueness of word "product" through explanation in terms of "but for" causation).

[39] *See, e.g.*, Washington v. United States, 390 F.2d 444, 454-56 (D.C. Cir. 1967)(court limited psychiatric testimony involving use of medical labels such as "product" and "mental disease" to reduce jury confusion between legal and scientific terms); Blocker v. United States, 288 F.2d 853, 863-64 (D.C. Cir. 1961)(Burger, J., concurring)(court addressed problem of experts' conclusory opinions resolving ultimate jury question).

Eventually the District of Columbia Court of Appeals withdrew its support of the *Durham* rule. *See* United States v. Brawner, 471 F.2d 969, 981-83 (D.C. Cir. 1972)(*Durham* no longer valid law). The court chose to adopt the Model Penal Code standard promulgated by the American Law Institute. *Id.* at 983; *see also* Blocker v. United States, 288 F.2d 853, 867 (D.C. Cir. 1961)(Burger, J., concurring)("product" test unfounded from its inception). At present, no jurisdictions adhere to the *Durham* rule. Comment, *supra* note 10, at 805. For a discussion of the ALI standard, *see infra* note 52.

[40] 232 F.2d 274 (5th Cir. 1956).

[41] *See id.* at 275 (test impliedly recognized by Supreme Court in *Davis* would be followed). The court cited an earlier Fifth Circuit decision which held that only slight evidence of insanity was necessary to require the submission of the issue to the jury. *Id.* at 276 n.5 (citing Lee v. United States, 91 F.2d 326, 330-31 (5th Cir. 1937)). The *Howard* court also cited the two *Davis* opinions as authority for this interpretation. *Howard*, 232 F.2d at 276 n.5 (citing Davis v. United States, 160 U.S. 469, 486 (1895), *remand reviewed*, 165 U.S. 373, 375 (1897)).

[42] *Howard*, 232 F.2d at 275 & n.1 (citing Smith v. United States, 36 F.2d 548, 550 (D.C. Cir. 1929)). The dissenting opinion questioned this method of interpretation as it did not employ a direct review of the earlier *Davis* cases. *Id.* at 277 (Cameron, J., dissenting).

[43] *See Howard*, 232 F.2d at 275-76 (test set out either cognitive or volitional inabil-

terpretation of the early *Davis* cases came in 1961 in a Third Circuit Court of Appeals decision, *United States v. Currens*.[44] The Third Circuit analyzed both of the *Davis* decisions in light of a 1913 United States Supreme Court decision tacitly approving the additional language of a jury charge which called for acquittal of the accused if the offense was the "result or offspring of insanity."[45] In view of the Supreme Court's subsequent silence on the appropriate federal rule for criminal responsibility,[46] the *Currens* court recognized the validity of further exploration for an appropriate insanity defense which would incorporate new medical knowledge.[47] The test adopted in *Currens* spoke solely in volitional terms of the accused's capacity to conform his conduct to the requirements of the law.[48] *Currens* was an atypical modification[49] of a newly emerging standard: the American Law Institute's Model Penal Code section 4.01, published in 1962 in a proposed official draft.[50]

Publication of the American Law Institute (ALI) test in the Model Penal Code signaled the development of a fourth major standard for the insanity defense[51] and incorporated two provisions:

---

ity as criteria).

[44] 290 F.2d 751 (3d Cir. 1961); *see also* Moore, *supra* note 11, at 59-60 (interpretation was prompted by question of whether circuits must adhere to *Davis* precedent).

[45] *Currens*, 290 F.2d at 767-70. The *Currens* court noted that in the 1913 decision *Matheson v. United States*, the language "result or offspring of insanity" was added to the traditional jury charge otherwise given in accord with the *Davis* standards. *Currens*, 290 F.2d at 768 (citing Matheson v. United States, 227 U.S. 540 (1913)). The *Currens* court viewed the additional jury charge as very nearly encompassing the *Durham* rule. *Currens*, 290 F.2d at 768. Further, the court found that the additional charge given in *Matheson* tended to lessen the force of the *Davis* decisions. *Id.* at 769.

[46] *Currens*, 290 F.2d at 768-69. The *Currens* court theorized that the Supreme Court, by its refusal to grant certiorari, viewed the federal courts as laboratories in which substantive law would develop. *Id.* at 769.

[47] *Id.* at 770-71. The court referred to the tremendous strides in psychiatry since the time of *M'Naghten* and emphasized the need to make a complete presentation of the defendant's relevant psychiatric and medical history when determining criminal responsibility. *Id.* at 770-72.

[48] *Id.* at 774. From a discussion of the concept of mens rea or guilty mind, the court reasoned that wherever there was reasonable doubt concerning a person's capacity for choice or self-control, there was also doubt as to the existence of the requisite guilty mind. *Id.* at 773.

[49] *Id.* at 774 n.32. In reference to the ALI standard, the Third Circuit excluded the criterion of ability to appreciate criminality, having discounted it as distracting, overemphasizing the cognitive element, and amounting to surplusage. *Id.* For the text of the ALI standard, see text accompanying note 52.

[50] MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962).

[51] *See* Dutile & Singer, *supra* note 34, at 1106-08 (discussion of Model Penal Code

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.
> (2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.[52]

A typical early example of the normal pattern followed by the federal circuits in adopting the ALI test was found in the Tenth Circuit decision, *Wion v. United States*.[53] In *Wion*, the court adopted the cognitive and volitional elements of the Model Penal Code test and rejected the *Currens* single-standard test.[54] At this same time, however, an evenly divided Fifth Circuit Court of Appeals refused to adopt the ALI standard in its 1963 decision, *Carter v. United States*.[55] Judge Bell, in dissent, offered an integrated analysis of the insanity defense

---

as fourth insanity test).

[52] MODEL PENAL CODE § 4.01 (Official Draft and Revised Comments 1985). Commentators have interpreted the ALI test as broader than the earlier synthesized tests. The principles of *M'Naghten* and the criteria of irresistible impulse were blended to require only a lack of "substantial capacity" rather than the complete impairment requirement of *M'Naghten*. *See, e.g.*, Comment, *supra* note 10, at 805 (both impairment of volition and cognition incorporated into ALI formulation); W. LAFAVE & A. SCOTT, *supra* note 7, § 38, at 293 (basic concept of *M'Naghten* and irresistible impulse were combined and broadened in ALI standard). Other specific words keynoted the modern language approach without sacrificing the concepts of legal precedent. *Id.* "Appreciate" replaced the word "know" and facilitated psychiatric testimony. *Id.* "Conform" corrected the implied limitation to sudden action often associated with the irresistible impulse rule to include acts accompanied by brooding and reflection. *Id.; see also* Dutile & Singer, *supra* note 34, at 1106-07 (advantages recognized where newly worded concepts allowed assessment by degrees and better calibration). An earlier draft concerning the purpose of Paragraph (2) of the ALI test explained that the test was structured to prohibit the psychopathic personality from raising the defense of mental disease or defect. MODEL PENAL CODE § 4.01 comments (Tent. Draft No. 4, 1955).

[53] 325 F.2d 420 (10th Cir. 1963), *cert. denied*, 377 U.S. 946 (1964). The ALI standard generally received support in various federal circuits. *See, e.g.*, United States v. Smith, 404 F.2d 720, 727 (6th Cir. 1968)(adopting ALI insanity defense standard); United States v. Chandler, 393 F.2d 920, 926-27 (4th Cir. 1968)(en banc)(same); United States v. Shapiro, 383 F.2d 680, 686 (7th Cir. 1967)(en banc)(same).

[54] *See Wion*, 325 F.2d at 427, 430 (court directed jury charge to be in language of ALI standard). Rejection of the *Currens* standard was based on the court's unwillingness to abandon moral considerations in evaluating criminal responsibility. *Id.* at 427.

[55] 325 F.2d 697 (5th Cir. 1963)(en banc)(per curiam), *cert. denied*, 381 U.S. 927 (1965). The defendant, a former Air Force captain, was convicted of perjury stemming from a forged check charge, and he pleaded insanity. *Id.* at 698-99.

which incorporated questions of burden of proof and admission of evidence, focused on jury instructions and jury responsibility, and recognized that American legal precedent included volition and cognition.[56]

Finally, in 1969, the Fifth Circuit reconsidered and then adopted the ALI test in *Blake v. United States*.[57] In *Blake*, the issue was framed to settle the conflict between the complete lack of capacity standard, which the *Blake* court attributed to the earlier *Davis* charge, and the substantial lack of capacity standard, which was incorporated in the ALI test.[58] Upon a review of decisions in other federal circuits,[59] the Fifth Circuit chose the ALI definition, acknowledging both the value of a uniform test and its latitude for interpretation and adapta-

---

[56] *Id.* 703-07 (Bell, J., joined by Tuttle, Brown, and Wisdom, JJ., dissenting). Judge Bell supported the test of insanity adopted in the second *Davis* decision but cautioned that the language in *Davis* should not be interpreted as exclusive per se or as a stereotype. *Id.* at 703-04. He pointed out that the definition of insanity in *Davis* posed the question of insanity in terms of volition and cognition, but the language used was broad and general. *Id.* at 704-05. Judge Brown addressed the need for flexibility in admitting evidence and in translating legal tests into effective guidelines for jurors. *Id.* at 708 (Brown, J., joined by Wisdom, J., concurring specially with dissenting opinion of Bell, J.).

[57] 407 F.2d 908 (5th Cir. 1969)(en banc). The defendant, who had a long history of psychiatric problems, committed a bank robbery but defended his actions on the grounds of insanity. *Id.* at 909, 911-12.

[58] *Id.* at 913-14. The court noted that the outcome for the defendant with an insanity defense would not be the same under the two different standards: under the *Davis* standard requiring complete mental disorientation, Blake would not be acquitted, while under the test requiring a substantial lack of capacity to understand, he might have prevailed. *Id.* at 914. The court used a two-step evidentiary analysis: first, it reasoned that if there was some evidence of insanity, even though slight, then the question of insanity was for the jury; second, the question of the sufficiency of the evidence was for the court to resolve. *Id.* at 911; *see, e.g.*, Nagell v. United States, 392 F.2d 934, 937 (5th Cir. 1968)(court would reverse where evidence clearly supported reasonable doubt); Mims v. United States, 375 F.2d 135, 140-44 (5th Cir. 1967)(jury role to determine credibility and weight of expert testimony). In *Blake*, the Fifth Circuit concluded that the evidence was sufficient to require its submission to the jury. *Blake*, 407 F.2d at 912-13.

[59] *Blake*, 407 F.2d at 914-16. The court methodically catalogued the adoption of the ALI standard by the other circuits, noting, in particular, the wide latitude for variation as demonstrated by the District of Columbia Circuit (*Durham* modified by *McDonald*), the Third Circuit (*Currens*) and the Eighth Circuit (emphasis on charge that required jury to analyze cognition, volition and capacity to control behavior). *Id.* at 914-15. In addition, the court discussed variations in the adoption of Paragraph (2) of the Model Penal Code and its selection of the word "wrongfulness" in Paragraph (1) as a substitute for "criminality." *Id.* at 915-16. The Fifth Circuit followed the Second, Fourth and Seventh Circuits in deciding to include Paragraph (2), and the Second and Seventh Circuits in deciding to use "wrongfulness" in adopting Paragraph (1). *Id.*; *see* United States v. Brawner, 471 F.2d 969, 979-81 (D.C. Cir. 1972)(in-depth analysis of ALI tests in circuits).

tion to new medical information concerning diseases of the mind.[60]

In 1984, the Fifth Circuit Court of Appeals abruptly changed directions in *United States v. Lyons*.[61] Sitting en banc, the court held that where the insanity defense was raised, the test for criminal responsibility was solely whether the defendant was unable to appreciate the wrongfulness of his conduct, thereby eliminating the requirement of substantial capacity to conform his conduct to the requirements of the law.[62] Although recognizing that basic concepts underlying criminal

---

[60] *Blake*, 407 F.2d at 915. The court treated as dictum the insanity test set forth in the second *Davis* case. *Id.*

[61] 731 F.2d 243 (5th Cir.), *cert. denied*, 105 S.Ct. 323 (1984). The United States initiated criminal charges alleging the defendant knowingly and intentionally secured controlled narcotics through fraudulent practices in violation of 21 U.S.C. § 843(a)(3)(1976) and 18 U.S.C. § 2 (1976). *Id.* at 244 & n.1. The defendant, claiming involuntary drug addiction that resulted from prolonged medical treatment, sought to raise the defense of insanity and argued that due to mental disease and defect he lacked substantial capacity to conform his conduct to the requirements of the law. *Id.* The district court excluded all evidence of Lyon's addiction to narcotics, apparently because the defendant's drug addiction was insufficient to meet the insanity defense requirement of mental disease or defect. *Id.* Following conviction by the district court, a panel of United States Court of Appeals for the Fifth Circuit reversed and remanded, concluding that whether involuntary drug addiction constituted a mental disease or defect which would render the defendant without capacity to conform his conduct to the requirements of the law was a question for the jury. *Id.* at 244-45. The Fifth Circuit in the *Lyons* panel decision stated that precedent clearly established that if the defendant produced slight evidence of insanity, then the burden of proving the defendant sane beyond a reasonable doubt shifted to the government. United States v. Lyons, 704 F.2d 743, 747 (5th Cir. 1983)(citing Blake v. United States, 407 F.2d 908, 910-11 (5th Cir. 1969)). The panel referred to an earlier Fifth Circuit opinion wherein submission of evidence showing involuntary drug addiction was adjudged proper in determining sanity. *Lyons*, 704 F.2d at 743, 747-48 (citing United States v. Bass, 490 F.2d 846, 849-52 (5th Cir. 1974)).

[62] *Lyons*, 731 F.2d at 248 (5th Cir. 1984). The Fifth Circuit was careful to follow legal precedent which held that mere drug addiction alone cannot be regarded as mental disease or defect for purposes of the insanity defense. *Id.* at 245-46; *see* Bailey v. United States, 386 F.2d 1, 4 (5th Cir. 1967)(criminal intent remained because of addict's choice to acquire and use drugs), *cert. denied*, 392 U.S. 946 (1968); *see also* United States v. Moore, 486 F.2d 1139, 1181-85 (D.C. Cir.)(en banc)(difficulty in evaluating whether drug addict is incapable of refraining from use), *cert. denied*, 414 U.S. 980 (1973); United States v. Freeman, 357 F.2d 606, 625 (2d Cir. 1966)(immunity for narcotics addiction inconsistent with congressional penalties for drug use). The court in *Lyons* cited United States v. Romano, 482 F.2d 1183, 1196 (5th Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974), for a comparative statement concerning the involuntary use of drugs when the *Romano* court actually spoke to the voluntary use of drugs. *Compare Lyons*, 731 F.2d at 245 (*Romano* addressed involuntary drug use) *with Romano*, 482 F.2d at 1196 (voluntary drug use not legal equivalent of insanity). Moreover, the court overruled United States v. Bass, 490 F.2d 846 (5th Cir. 1974), to the extent it held that drug addiction alone, whether voluntary or involuntary, could constitute mental disease for purposes of legal

responsibility were found in the legal precedents of the common law[63] and that precedent in the Fifth Circuit had been set forth in *Blake* wherein the ALI two-fold test was adopted,[64] the *Lyons* court declared that it was an appropriate judicial exercise to reappraise *Blake* because of new policy considerations emanating from the behavioral sciences.[65] The court stated that a majority of psychiatrists now recognize that scientific methods are inadequate to sufficiently and accurately measure a person's capacity or lack of capacity for self control[66] and that there exists no objective basis on which to rest the volitional test.[67] Additional problems in the administration of the insanity defense were identified by the majority in the *Lyons* decision: first, the inherent risk of error when jurors and experts speculate on the defendant's capacity for self-control, and second, the confusion for jurors that is more likely to arise from psychiatric testimony concerning human volition than

---

insanity. *Lyons*, 731 F.2d at 246. Since the proffered evidence, however, went beyond a showing of mere drug addiction by its claim of physiological damage to the brain and ensuing mental disease or defect, the court conceded that the defendant should be given the opportunity to prepare an insanity defense under the newly limited standard. *Id.* at 247, 249-50.

[63] *Lyons*, 731 F.2d at 247-48; *see Wion*, 325 F.2d at 425 (common-law tradition gave rise to federal courts' authority to review).

[64] *Lyons*, 731 F.2d at 248 (citing *Blake*, 407 F.2d at 915). The Fifth Circuit in *Lyons* rationalized its abdication of the earlier *Howard* test as having been influenced by then current information furnished by the behavioral sciences. *Lyons*, 731 F.2d at 248 & n.8 (citing *Howard*, 232 F.2d at 275). The *Lyons* court stated that "[u]nfortunately, it now appears our conclusion was premature—that the brave new world that we foresaw has not arrived." *Lyons*, 731 F.2d at 248.

[65] *Lyons*, 731 F.2d at 248. These considerations specifically involved new psychiatric data. *Id.* In the first part of the opinion, the court declared that when it defined mental disease or defect, the court was making a determination that was not medical but rather one involving legal, moral and policy considerations. *Id.* at 246. The court also made reference to the limits of medical categorization and analogized to alcoholism's not being considered legally a mental disease or defect for insanity defense purposes. *Id.* at 245 n.3, 246 & n.4.

[66] *Id.* at 248 (citing Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A.J. 194, 196 (1983)). The court also acknowledged relevant congressional testimony supporting its position. *Lyons*, 731 F.2d at 248 n.10.

[67] *Lyons*, 731 F.2d at 248. The court, in assessing the potential for deliberate as well as moral errors inherent in the insanity defense, relied on Professor Bonnie's statement that the greatest errors occurred when the ultimate question involved a determination of the capacity for self-control and ability to resist. *Id.* at 249 (quoting Bonnie, *supra* note 66, at 196). The court also noted the American Psychiatric Association's statement that the distinction between an irresistible impulse and an impulse not resisted was almost imperceptible. *Lyons*, 731 F.2d at 248 (quoting *American Psychiatric Association Statement on the Insanity Defense* 11 (1982)[hereinafter cited as *APA Statement*].

from testimony concerning cognitive ability.[68] The court further reasoned that when a psychotic person is evaluated by reference to the two insanity criteria, one focusing on ability to control, the other on inability to understand, there appears to be considerable overlap which suggests superfluity.[69] The court thus rationalized its statement that the volitional test does not reflect current findings in the fields of medicine and the behavioral sciences.[70] Furthermore, the court, cognizant that the burden of proof for federal prosecution is proof beyond a reasonable doubt,[71] noted that the burden of proof under the volitional test often would be impossible to meet because no reliable medical conclusions can be reached about the capacity and degrees of self control.[72] The court concluded that the better premise on which to ground legal policy is to view all criminal impulses from the perspective of being resistible,[73] and thus the court necessarily rejected the volitional test and based the defense of insanity solely on the defendant's inability to appreciate the wrongfulness of his conduct because of mental disease or defect.[74]

Judges Rubin and Williams reasoned in their partial dissent in *Ly-*

---

[68] *Lyons*, 731 F.2d at 249 (citing *APA Statement*, *supra* note 67, at 12).

[69] *Lyons*, 731 F.2d at 249. The court relied on the *APA Statement* to support the proposition that the volitional test was superfluous for a person with a mental disease or defect because failure of the volitional test would also trigger failure of the cognitive test. *Id.* (citing *APA Statement*, *supra* note 67, at 12); *see also* H. FINGARETTE, *supra* note 15, at 219-20 (malfunction of volitional component would comparably affect cognition).

[70] *See Lyons*, 731 F.2d at 248 (court concluded volitional portion of *Blake* standard no longer appropriate).

[71] *Id.* at 249 (citing *Davis*, 160 U.S. at 487-88).

[72] *Lyons*, 731 F.2d at 249. The court quoted a commentator's argument in reference to the attempted assassination of President Reagan by John Hinckley that the instruction requiring a jury to find a defendant not guilty unless they agree beyond a reasonable doubt that the defendant was sane, "[i]f taken literally . . . amounted to a directed verdict of not guilty, considering the deadlock of expert opinion and the difficulty of certifying the sanity. . ." of Hinckley. *Lyons*, 731 F.2d at 249, n.13 (quoting Johnson, Book Review, 50 U. CHI. L. REV. 1534, 1536 (1983)(reviewing N. MORRIS, MADNESS AND THE CRIMINAL LAW (1982)).

[73] *Lyons*, 731 F.2d at 249. The court stated that the volitional standard should only be applied if medical science ever devised techniques to analyze human volition. *Id.*

[74] *Id.* at 248-49. The court stated that its reasons for changing the phrase "lacks substantial capacity to appreciate the wrongfulness of his conduct" to "unable to appreciate" were similar to those expressed in the Commentary of the American Bar Association Standing Committee. *Id.* at 248 n.9. The court agreed that the word "appreciate" connoted sufficient flexibility and that the change simplified the insanity standard, reducing the risk of the test's being interpreted too loosely by jurors. *Id.* The court vacated and remanded to allow Lyons the opportunity for a trial under the new standard. *Id.* at 249-50.

ons[75] that the specific issue raised in the case could be resolved by applying the law precedent concerning drug addiction,[76] and, therefore, this case was not a proper vehicle for reexamination of the insanity defense.[77] Further, they noted the potential impact of pending congressional action[78] as well as the recent recommendations by the American

---

[75] *Id.* at 250 (Rubin, Williams, JJ., concurring in part, dissenting in part). Judges Politz, Tate and Higginbotham joined in this partial dissent. *Id.* These five judges agreed with the majority's conclusion that mere drug addiction would not justify the insanity defense; however, they disagreed with the majority that *Lyons* was an appropriate case for considering and changing the insanity standard. *Id.*

Judge Johnson wrote an additional dissent. *Id.* at 253 (Johnson, J., dissenting). Judge Johnson stated that the only issue was whether the evidence of insanity was sufficient to submit to the jury, and this issue was resolved by existing precedent set forth in *United States v. Bass*, 490 F.2d 846 (5th Cir. 1974). *Lyons*, 731 F.2d at 253-54, 254 n.3 (Johnson, J., dissenting). Judge Johnson further reasoned that because legislative reforms by Congress were quite possible a judicially mandated change in the insanity standard was inappropriate at that time. *Id.* at 255. Ultimately six members of the court were opposed to using the *Lyons* decision to change the insanity standard, thus evidencing a strongly divided court. *See id.* at 250, 255 (Rubin, Williams, Politz, Tate, and Higginbotham, JJ., concurring in part, dissenting in part; Johnson, J.. dissenting in part)(7-6 decision on changing insanity standard).

[76] *Lyons*, 731 F.2d at 250-52 (Rubin, Williams, Politz, Tate, and Higginbotham, JJ., concurring in part, dissenting in part); *see supra* note 62. These five judges cited Bailey v. United States, 386 F.2d 1, 3-4 (5th Cir. 1967), *cert. denied*, 392 U.S. 946 (1968), for the rule that mere drug addiction alone did not rise to the level of "some evidence" in determining whether an issue should go to the jury. *Lyons*, 431 F.2d at 250-51 (opinion concurring in part, dissenting in part). Moreover, these judges viewed the problem as one of drug addiction semantics, concerning voluntary versus involuntary distinctions, without involving questions of sufficiency of the evidence as raised in *United States v. Bass*. *Lyons*, 731 F.2d at 251-52 (opinion concurring in part, dissenting in part)(citing United States v. Bass, 490 F.2d 846 (5th Cir. 1974), *overruled in part*, United States v. Lyon, 731 F.2d 243 (5th Cir. 1984)). These judges agreed that it was not necessary to overrule *Bass*. *Lyons*, 731 F.2d at 250 (opinion concurring in part, dissenting in part). See *supra* note 62.

[77] *Lyons*, 731 F.2d at 252 (opinion concurring in part, dissenting in part). The members of the court who concurred and dissented limited Lyons' proffer of evidence because he did not plead the existence of mental disease or defect on appeal. *Id.* These five judges did acknowledge that the government had adapted its suit in *Lyons* to bring the insanity standard in issue, but they objected to considering the standard in a case where the evidence did not necessitate such a review. *Id.* at n.2.

[78] *Id.* at 252; *see supra* note 66; *see also The Insanity Defense: Hearings on S. 818, S. 1106, S. 1558, S. 2669, S. 2672, S. 2678, S. 2745, and S. 2780 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 26-31 (1982)(statement of Hon. William French Smith, U.S. Atty. Gen.)(recommendation to eliminate insanity as special defense, to consider mental illness at sentencing, and to provide commitment procedures). *But cf.* United States v. Brawner, 471 F.2d 969, 985-86 (D.C. Cir. 1972)(abolition of insanity defense cannot be accomplished through judicial decision); Comment, *supra* note 10, at 797-801, 806-08, 811-16, 820 (due process problem in any effort to eliminate insanity

Bar Association for changes concerning the insanity defense,[79] and concluded that to change the standard currently held by every federal court was untimely.[80]

In an additional dissent handed down four months after the majority opinion,[81] Judge Rubin elaborated that the new standard proposed by the majority would punish a person who could not control his behavior,[82] raising the question of the appropriateness of a punishment-without-fault standard.[83] Judge Rubin rebutted the majority's catalogue of reasons for change through his development of the following arguments: first, a public misconception existed as to the frequency and successful use of the insanity defense, as well as the process of release;[84] second, psychiatric testimony was more often than not misconstrued as a battleground;[85] and third, the majority's allegation that

---

defense, citing Sinclair v. State, 161 Miss. 142, 132 So. 581, 586 (1931)(Etheridge, J., specially concurring), although possible solution by shifting burden of persuasion to defendant). *See generally* W. LaFave & A. Scott, *supra* note 7, § 36, at 272-74 (arguments presented both for and against abolition of insanity defense).

[79] *Lyons*, 731 F.2d at 252-53 (opinion concurring in part, dissenting in part). The American Bar Association recommended a cognitive insanity standard and withdrew its support for the volitional tests. Winter, *Insanity Test*, 69 A.B.A.J. 426 (1983). The newly restricted standard defined the insanity defense in terms of whether the defendant was unable to appreciate that his conduct was wrongful because of his mental disease or defect. *Id.*; *see* Dutile & Singer, *supra* note 34, at 1107-09 (insanity defense recommendations of American Psychiatric Association and American Bar Association).

Concerning the burden of proof, the ABA recommended a shift to the defendant where the ALI test was used, but where the proposed ABA standard was used, the burden should remain on the prosecution. The ABA panels sought to eliminate the volitional standards because of several perceived problems: (1) "fabricated" expert testimony concerning a person's lack of ability to control his behavior; (2) vulnerability of the Model Penal Code because of the scientific difficulty of evaluating a person's capacity of control; (3) "overly vague 'substantial capacity' language." Dutile & Singer, *supra* note 34, at 1108.

[80] *Lyons*, 731 F.2d at 253 (opinion concurring in part, dissenting in part). Judges Rubin and Williams, in partial dissent, cited a detailed survey of the circuits, but no decision of the Second Circuit Court of Appeals was included. *Id.* at n.3; *see* United States v. Freeman, 357 F.2d 606, 622 (2d Cir. 1966) (adopting ALI test).

[81] United States v. Lyons, 739 F.2d 994 (5th Cir. 1984)(Rubin, J., dissenting). Judge Tate joined Judge Rubin in this dissent rendered August 13, 1984. *Id.*

[82] *Id.* at 994.

[83] *Id.* Judge Rubin, stating that his dissent was directed only at the "amputation" of the volitional arm of the insanity defense, reasoned that by definition a person unable to refrain from criminal behavior could not possess guilt. *Id.* at 999-1000.

[84] *Id.* at 995-96, & nn.8-9; *see* W. LaFave & A. Scott, *supra* note 7, § 36, at 269 (result of verdict of not guilty by reason of insanity was automatic commitment or involvement in further hearings).

[85] *Lyons*, 739 F.2d at 996-97 (Rubin, J., dissenting).

jurors misunderstand legal standards in the context of expert psychiatric testimony had not been substantiated.[86] Judge Rubin criticized the fact that no substantial data supported the majority's change in the legal standard, which he categorized as an amputation of the control test.[87] Because the question of guilt is premised in criminal responsibility which involves *actus reus* and *mens rea*, or mental state, as these concepts relate to meaningful choice,[88] Judge Rubin concluded that punishment of an individual who has no ability to obey the law conflicts morally and philosophically with our system of criminal justice.[89]

B. The Burden of Proof

The State Legislatures: The Gauntlet Is Thrown Down, and Insanity/Mens Rea Retreats

While both *Davis v. United States* decisions were pivotal in the development of the federal insanity defense, the first *Davis* decision announced in 1895 stated the basic procedural rules for the federal courts concerning presumption of sanity and burden of proof.[90] In *Davis*, the United States Supreme Court recognized the following procedural progression: first, a presumption of sanity is recognized; second, the defendant is required to produce some evidence to overcome the presumption; third, upon some proof of insanity having been presented, the prosecution is required to prove the defendant sane beyond a reasonable doubt.[91] The approach of the *Davis* court was to view the presumption of sanity, if rebutted by some evidence of insanity, as becoming functionally the equivalent of an element of the offense because of the close kinship of sanity to mens rea, a mental

---

[86] *Id.* at 997 & n.13. Judge Rubin recommended that the problems raised by expert testimony be resolved through evidentiary procedures. *Id.* at 998; *see infra* notes 136-47 and accompanying text.

[87] *Id.* at 994, 997, 999, 1000. Judge Rubin reproached the majority for initiating so radical a change from the uniform rule of the circuits on the basis of a limited number of professional associations' recommendations that were largely unsubstantiated. *Id.* at 1000; *see supra* note 83.

[88] *Lyons*, 739 F.2d at 997-98. A determination of the defendant's state of mind could not ethically be avoided in resolving whether defendant was blameworthy. *Id.* at 998.

[89] *Id.* at 1000.

[90] *Davis*, 160 U.S. at 486-91; *see* Note, *Stopping the Revolving Door: Adopting a Rational System for the Insanity Defense*, 8 HOFSTRA L. REV. 973, 982-83 (1980)(*Davis* assigned burden of proof for sanity to federal prosecutor).

[91] *Davis*, 160 U.S. at 486-91; *see supra* note 27; *see also* Billiot v. State, 454 So. 2d 445, 463 (Miss. 1984)(Mississippi follows similar analysis in allocation of burden of proof), *cert. denied*, 105 S. Ct. 1232 (1985).

attitude indicating moral fault or blameworthiness, which is a basic prerequisite to criminal culpability.[92]

In 1952, a second approach to the insanity defense was approved by the United States Supreme Court in *Leland v. Oregon*.[93] This approach viewed insanity as an affirmative defense and thus separate from the essential elements of the crime, including mens rea.[94] In *Leland*, the Court recognized the careful separation of the state's burden to prove all essential elements of the crime from the defendant's burden under the Oregon statutory standard to prove his insanity beyond a reasonable doubt.[95] The Court concluded that no due process violation was implicated by the Oregon statute[96] and further delineated the scope of *Davis v. United States* by announcing that "[t]he [*Davis*] decision obviously establishes no constitutional doctrine, but only the rule to be followed in federal courts."[97]

The continuing tension between the *Davis* approach for the federal courts, placing on the state the burden of proving all essential elements, including sanity as it affects mens rea, and the *Leland* approach approving the state's placing the burden on the defendant to prove insanity, was brought into focus in the 1970 decision *In re Winship*[98] and

---

[92] *Davis*, 160 U.S. at 484-93. Justice Harlin, who delivered the opinion, stated:

> How then upon principle or consistently with humanity can a verdict of guilty be properly returned, if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit that crime?

Id. at 488. *See* Commonwealth v. Vogel, 440 Pa. 1, 268 A.2d 89, 90-91 (1970)(Roberts, J., opinion in support of per curiam order)(if mens rea is requisite element of crime then legal sanity is likewise requisite element). *See generally* Jeffries & Stephan, *Defenses, Presumptions and the Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1371-76 (1979)(mens rea, indicating moral facet, as essential tenet of criminal culpability).

[93] 343 U.S. 790 (1952).

[94] *See* Note, *supra* note 90, at 983-84 (*Leland* Court treated issue of sanity separately from elements of crime); *See also* Hermann, note 7, at 272-73 (insanity as affirmative defense excuses criminal responsibility and is classified as extrinsic to elements of crime); Slovenko, *The Insanity Defense in the Wake of Hinckley Trial*, 14 RUTGERS L.J. 373, 388 (1983)(two views: (1) burden on prosecution because sanity interrelated to actus reus and mens rea in forming requisite mental state for criminal culpability; (2) burden on defendant because no perceived relationship between sanity and actus reus and mens rea).

[95] *Leland*, 343 U.S. at 794-96, 798-810. Currently, Oregon statutorily treats insanity as an affirmative defense, but the legislature has reduced the defendant's burden of proof to a preponderance of the evidence. OR. REV. STAT. ANN. §§ 161.055(2), 161.305 (Butterworth 1983).

[96] *Leland*, 343 U.S. at 798-99.

[97] *Id.* at 797 (citing *Davis*, 160 U.S. 469).

[98] 397 U.S. 358 (1970).

the 1975 decision *Mullaney v. Wilbur.*[99] In *Winship*, the United States Supreme Court reaffirmed the necessity of the state's proving beyond a reasonable doubt "every fact necessary to constitute the crime with which [the defendant] is charged."[100] The *Winship* principle was implemented in *Mullaney*, where the Court focused upon a Maine statute which required that a defendant seeking to reduce his charge from murder to manslaughter prove his criminal act was the result of heat of passion induced by sudden provocation.[101] Applying the *Winship* standard of proof for the purpose of determining the degrees of criminal culpability in homicide cases, the Supreme Court held that due process mandated that it was the burden of the prosecution to prove beyond a reasonable doubt the absence of heat of passion resulting from sudden provocation.[102] The practical effect of the Court's action was the implicit prohibition of a presumption of criminal intent and the express refusal to allow a shift in the burden of proof to the defendant to prove the requisite mental state of having acted in the heat of passion on sudden provocation.[103] The majority opinion in *Mullaney* further recognized that the *Winship* mandate was not limited to the state's definition of criminal liability because a state could redefine the elements of a crime by recasting them as mitigating factors relevant for punishment purposes.[104]

By contrast, the concurring opinion by Justice Rehnquist in *Mullaney* would have reaffirmed the *Leland v. Oregon* holding by finding that a relationship did not necessarily exist between legal insanity and

---

[99] 421 U.S. 684 (1975).

[100] *Winship*, 397 U.S. at 364. The Court's holding in *Winship* was formulated in response to a twelve-year-old boy's being adjudged delinquent for stealing a pocketbook, an act which would constitute the crime of larceny if committed by an adult. *Id.* at 358-60. A New York statute required proof by a preponderance of the evidence for the purpose of adjudicating delinquency. The boy was ordered confined to a state training school where he could have potentially been held for six years. *Id.* at 360. *See Jeffries & Stephan, supra* note 92, at 1328-38 (*Winship* began process of constitutionalizing burden of proof).

[101] *Mullaney*, 421 U.S. at 703.

[102] *Id.* at 704. The Court noted support for its conclusion in a related line of cases, including *Davis v. United States. Id.* at 702 n.31 (citing *Davis*, 160 U.S. 469); *see* Note, *Constitutional Limitations on Allocating the Burden of Proof of Insanity to the Defendant in Murder Cases*, 56 B.U.L. REV. 499, 500 (1976)(constitutional implications in shifting burden).

[103] *See Mullaney*, 421 U.S. at 702 (citing Tot v. United States, 319 U.S. 463 (1943), and Leary v. United States, 395 U.S. 6 (1969)); *see also* Sandstrom v. Montana, 442 U.S. 510, 524 (1979)(*Mullaney* established that presumption of requisite intent would be found unconstitutional).

[104] *Mullaney*, 421 U.S. at 698-99.

the essential mental element of the criminal offense, and, therefore, the allocation of burden of proof dictated in *Winship* had not been impermissively shifted in *Leland*.[105] In the 1976 decision *Rivera v. Delaware*,[106] the Court implicitly signaled approval of the defendant's being required to prove insanity by a preponderance of the evidence in dismissing the case on appeal as one which did not raise a substantial federal question.[107] In dissent, however, Justice Brennan, joined by Justice Marshall, recognized insanity as inextricably tied to mens rea, which was a key element in criminal responsibility.[108]

In *Patterson v. New York*, which was decided in 1977,[109] the Court, addressing the affirmative defense of extreme emotional disturbance, restated its commitment to the *Leland* and *Rivera* decisions and reaffirmed as constitutionally permissible the requirement that the defendant carry the burden of proof on insanity.[110] The *Patterson* court found that the prosecution had proved beyond a reasonable doubt all essential elements statutorily required by New York law to constitute murder, and, therefore, no claim of due process violation could be maintained.[111] Further, the statutorily created affirmative defense was not found to negate any facts allotted to the state's burden of proof.[112] Elaborating on the issue of affirmative defenses, the Court refused to require the state to disprove the factual elements that comprised the affirmative defense and expressed deference to the legisla-

---

[105] *Id.* at 705-06 (Rehnquist, J., concurring).

[106] 429 U.S. 877 (mem.), *dismissing appeal from* 351 A.2d 561 (Del. 1976).

[107] *Id.* at 877. In *Rivera*, a Delaware statute was challenged which assigned to a defendant raising the insanity defense the burden that mental illness be proved by a preponderance of the evidence. *Id.* at 877-78 (Brennan & Marshall, JJ., dissenting)(citing DEL. CODE ANN., tit. 11, §§ 304, 401 (1975)).

[108] *Rivera*, 429 U.S. at 878-79 (Brennan, J., joined by Marshall, J., dissenting). Justice Brennan stated "[i]t is thus clear, following *Davis*, at least in the context of federal criminal procedure, that the accused's sanity is an ingredient of *mens rea*, an element of the crime which the prosecution must prove beyond a reasonable doubt." *Id.* at 878 (Brennan, J., dissenting).

[109] 432 U.S. 197 (1977).

[110] *Id.* at 205-07.

[111] *Id.* at 205-06. The state was required to prove death, intent to kill and causation with no further facts being presumed or inferred as constituting the crime. *Id.* The Court distinguished *Mullaney*, noting that the Maine statutory definition of essential elements of the crime, those which the prosecution must prove, included malice aforethought which implied absence of provocation. *Id.* at 215-16. Therefore, due process was violated where malice was presumed unless the defendant proved provocation. *Id.; cf.* C. MCCORMICK, EVIDENCE § 347, at 989 (3d ed. 1984)(constitutional ramifications of affirmative defenses and presumptions).

[112] *Patterson*, 432 U.S. at 206-07.

tive branch in balancing the basic elements of a crime which were defined by statute with the permissible mitigating factors which constituted an affirmative defense.[113]

Justice Powell, in the dissenting opinion, joined by Justices Brennan and Marshall, protested the narrow reading of *Winship* which would allow elements of a crime to be tailored to the face of the statute and which would give the legislature power to reallocate the burden of proof through affirmative defenses.[114] Justice Powell emphasized the need for due process protection of the presumption of innocence, which is ensured by placing the burden of persuasion on the prosecution when the basic elements of criminal responsibility such as those implicated in *Winship* and *Mullaney* are at issue.[115] As primary authority for his position, Justice Powell cited *Winship* where that decision quoted *Davis v. United States*.[116] Once again, the dichotomy between the insanity/mens rea approach of *Davis* and the affirmative defense approach of *Leland* was exposed.[117]

As to the quantum of proof the defendant must produce in proving an affirmative defense, the Supreme Court in footnote dictum in *Jones v. United States*[118] cited *Leland v. Oregon* to conclude that it is constitutionally permissible for a defendant to carry a higher burden of

---

[113] *Id.* at 207-11. The Court did qualify its position by stating that "[t]his view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously constitutional limits beyond which the States may not go in this regard." *Id.* at 210; *see also* Hermann, *supra* note 7, at 280-81 (Court advanced four rationales—two characterized as analytic, two as pragmatic or policy oriented); Jeffries & Stephan, *supra* note 92, at 1397 (Court in *Patterson* sensitive to potential legislative reform which should not be shackled with formal procedures).

[114] *Patterson*, 432 U.S. at 216, 221-25, 232 (Powell, J., dissenting). Justice Powell questioned how the Court was able "to run a constitutional boundary line through the barely visible space that separates Maine's law from New York's." *Id.* at 221.

[115] *Id.* at 225-27 (Powell, J., dissenting). Justice Powell first developed a two-fold analysis for determining whether a criminal factor was an essential element: (1) the significance of the factor's impact on difference in punishment and (2) the importance of the factor in the historical legal perspective. *Id.* at 226. Justice Powell objected to a legislative shift of burden of proof if both parts of his test were sustained. *Id.* at 227. However, Justice Powell then proceeded to expand on the flexibility state legislatures retained. *Id.* at 227-30; *see* Jeffries & Stephan, *supra* note 92, at 1361-63 (*Patterson* dissent incorporated discontinuous concepts).

[116] *Patterson*, 432 U.S. at 225, 227 (Powell, J., joined by Brennan and Marshall, JJ., dissenting)(citing *Winship*, 347 U.S. at 363, which quoted *Davis*, 160 U.S. at 484, 493).

[117] *See* text accompanying notes 92-94; *cf.* Frendak v. United States, 408 A.2d 364, 378 n.24 (D.C. 1979)(right to insanity defense has never been constitutionally mandated by Supreme Court).

[118] 103 S. Ct. 3043 (1983).

proof than a preponderance of the evidence.[119] Justice Brennan, in dissent, joined by Justices Marshall and Blackmun, reciprocally relegated to a footnote additional dictum reflecting the continuing conflict in the potential overlap of insanity with mens rea, stating that the Court has never "fully plumbed" the relationship.[120]

Prior to the enactment of the Insanity Defense Reform Act in 1984, the United States Supreme Court had addressed the posture of insanity as an affirmative defense, the placement of burden of proof of insanity upon the defendant, and the permissible weight of proof that the defendant must produce.[121] These developments, as reflected in state statutes, had been found by the Court to be constitutional in the *Leland*, *Rivera*, *Patterson*, and *Jones* decisions.[122] In contrast, the rule in the federal courts continued to be that determined in the 1895 *Davis* decision and continued to require that the prosecution must prove beyond a reasonable doubt that the defendant was sane.[123]

III. The Insanity Defense Reform Act of 1984: The Brave New World Emerges

A. The Legal Test, Affirmative Defense and Burden of Proof: The Fanfare—A New Medley

Section 402(1) of Title VI of the Insanity Defense Reform Act has created the new statutory provision 18 U.S.C. § 20:

> § 20. Insanity defense
> (a) Affirmative defense.—It is an affirmative defense to a

---

[119] *Id.* at 3051 n.17 (citing *Leland*, 343 U.S. 790). In *Jones*, the petitioner, an insanity acquittee, questioned his automatic commitment to a mental hospital for an amount of time longer than the maximum length of sentence which could have been imposed. *Id.* at 3045. The petitioner also alleged that due process was violated because the standard of burden of proof for insanity was preponderance of the evidence while the standard constitutionally mandated for civil commitment was clear and convincing proof. *Id.* at 3051 (citing Addington v. Texas, 441 U.S. 418, 426-27 (1979)). The Court ultimately rejected these arguments and held that where the defendant had been acquitted by proving his insanity by a preponderance of the evidence, it was not constitutionally impermissible to commit him, based on his insanity acquittal, for the length of time necessary for him to regain sanity or to cease being a threat. *Jones*, 103 S. Ct. at 3052-53.

[120] *Jones*, 103 S. Ct. at 3054 n.4 (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting); *see supra* note 7.

[121] *See supra* notes 93-97, 106-07, 109-13, 118-19 and accompanying text.

[122] *See* text accompanying notes 96-97, 106-07, 109-10, and 118-19.

[123] *See Lyons*, 731 F.2d at 249 (citing *Davis*, 160 U.S. 469 (1895); *see also* Hermann, *supra* note 7, at 275 (*Davis* continually applied to federal courts although Supreme Court in *Leland v. Oregon* later acknowledged no constitutional doctrine in *Davis*).

> prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.
>
> (b) Burden of proof.—The defendant has the burden of proving the defense of insanity by clear and convincing evidence.[124]

Congress has adopted as the federal standard for the insanity defense a narrow version of the cognitive portion of the ALI Model Penal Code test, having eliminated its volitional counterpart.[125] The new federal statutory standard follows closely the judicial standard announced in April, 1984, by the Fifth Circuit in *United States v. Lyons*.[126] Additionally, statutory modifications extend the earlier judicial definition: first, the mental disease or defect must be severe; second, the lack of appreciation by the insane defendant relates to the nature and quality of wrongfulness of his acts; and third, no mental disease or defect other than that which relegates the defendant to being unable to appreciate the nature and quality or wrongfulness of his acts will qualify as a defense.[127]

---

[124] Insanity Defense Reform Act § 402(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2057, 2057 (to be codified at 18 U.S.C. § 20).

[125] *See Senate Report, supra* note 5, at 225, 1984 U.S. CODE CONG. & AD. NEWS at 3407 & n.16 (abolishment of volitional portion resulted from extensive hearings, noting *The Insanity Defense: Hearings on S. 818, S. 1106, S. 1558, S. 2669, S. 2672, S. 2678, S. 2745, and S. 2780 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982)). Congressional hearings addressing the problems with the insanity defense began shortly after John W. Hinckley, Jr., who was charged with the attempted assassination of President Ronald Reagan, was found not guilty by reason of insanity. *See Limiting the Insanity Defense: Hearings Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 1-2 (1982)(statement of Sen. Spector)(hearings which were promptly convened included testimony of jurors in Hinckley trial); *cf.* United States v. Hinckley, 672 F.2d 115, 117 (D.C. Cir. 1982) (Hinckley indicted for attempting to assassinate President Reagan on March 30, 1981).

[126] *See supra* text accompanying note 62.

[127] *See Senate Report, supra* note 4, at 229, 1984 U.S. CODE CONG. & AD. NEWS at 3411. By utilizing a standard which strictly evaluates mental disease in terms of the inability to appreciate the nature and quality or wrongfulness of the criminal act, the Senate Committee foreclosed the use of the "diminished responsibility" defense; moreover, by utilizing the concept of severity, the Committee foreclosed the use of the insanity defense for behavior disorders that are nonpsychotic such as "immature personality." *Id.* The Committee also refused to recognize a situation where the defendant voluntarily uses alcohol or drugs as constituting insanity, citing United States v. Moore, 486 F.2d 1139 (D.C. Cir.)(en banc), *cert. denied*, 414 U.S. 980 (1973), and Powell v.

The Senate Judiciary Committee's Report on the 1984 Insanity Defense Reform Act and the judicial analysis in *Lyons* both emphasize the inherent difficulty in the volitional test, stemming from inability to effectively evaluate capacity or lack of capacity for self-control, and both offer strikingly similar support for elimination of the volitional test.[128] The *Lyons* court and Congress diverge on the designation of insanity as an affirmative defense and the placement of the burden of proof on the defendant.[129] *Lyons* addresses only the insanity standard, although an earlier Fifth Circuit opinion, *Carter v. United States*, had stressed within the context of insanity the interrelationships of the roles of burden of proof, the test for insanity, and effective instructions to jurors as the ultimate trier of facts.[130] Congress clearly followed the judicial evolution of insanity as an affirmative defense in the state courts by endorsing the holdings in *Leland v. Oregon* and *Patterson v. New York* and clearly considered *Jones v. United States* as precedent for authorizing a higher standard of proof, that of clear and convincing evidence.[131]

Texas, 392 U.S. 514 (1968). Both the *Moore* and *Powell* decisions were also cited in *Lyons* by the Fifth Circuit. *See Lyons*, 731 F.2d at 245, 246.

[128] *See Senate Report, supra* note 5, at 225-29, 1984 U.S. CODE CONG. & AD. NEWS at 3407-11 (control tests lack meaning for purposes of psychiatric determinism). The Senate Report quoted Richard J. Bonnie, Professor of Law and Director of the Institute of Law, Psychiatry and Public Policy, University of Virginia, for his statement regarding the absence of any objective basis to determine whether an impulse could or could not have been resisted. *Id.* at 3408-09; *see supra* notes 66-67 (*Lyons* court citing Bonnie). The Senate Report also quoted the similar stance taken by Professor David Robinson of George Washington University. *Senate Report, supra* note 5, at 227, 1984 U.S. CODE CONG. & AD. NEWS at 3409; *cf.* Lyons, 731 F.2d at 248 n.10 (citing Robinson). The American Psychiatric Association's Statement on the Insanity Defense comparing the lack of clarity between the irresistible/resistible impulse to the imperceptibility between twilight/dusk was used in both the Senate Report and the *Lyons* decision. *See Senate Report, supra* note 5, at 228, 1984 U.S. CODE CONG. & AD. NEWS at 3410 (problem with control test); *see also supra* notes 67-68 and accompanying text (*Lyons* court citing *APA* statement concerning difficulties with volitional tests). The Senate Report also reflected the supporting position of the American Bar Association as did the *Lyons* decision. *See Senate Report, supra* note 5, at 228, 1984 U.S. CODE CONG. & AD. NEWS at 3410 (ABA supported narrower definition of insanity defense); *cf. Lyons*, 731 F.2d at 248 n.9 (ABA Standing Committee criterion of "is unable" preferable to "lacks substantial capacity").

[129] *Cf. supra* text accompanying note 62 (*Lyons* narrowed test) *with supra* text accompanying note 3 (Insanity Defense Reform Act involved multiple considerations).

[130] *See supra* notes 55-56 and accompanying text.

[131] *See Senate Report, supra* note 5, at 224-25, 229-30, 1984 U.S. CODE CONG. & AD. NEWS at 3406-07, 231-32. The Senate Committee recognized that better than 50 percent of the states allotted the burden of proof for the insanity defense to the defendant although the Committee conceded that the standard was often preponderance of the evi-

The 1984 congressional enactment of 18 U.S.C. § 20 superceded the 1895 *Davis v. United States* decision both as to the insanity standard and the prosecution's role in carrying the burden of proof of sanity.[132] The Insanity Defense Reform Act melded the evolving federal judicial standard for insanity, as stated by the Fifth Circuit in *United States v. Lyons*, with the states' placement on the defendant of the burden of proof in an affirmative defense of insanity, as approved by the United States Supreme Court in *Leland v. Oregon* and *Patterson v. New York*.[133] The change in the federal standard had been presaged; the sweeping change for the federal courts came in the shifting of the burden of proof.[134] Because of existing judicial precedents, 18 U.S.C. § 20 has not raised any new due process challenges to the insanity defense that would support an allegation of excessive exercise of legislative powers even though the Act is a blending a two distinct, parallel lines of case law—one federal, as to the standard for insanity, the other state, as to affirmative defense and burden of proof.[135]

---

dence. *Id.* at 229, 1984 U.S. CODE CONG. & AD. NEWS at 3411. The Senate Report included direct testimony of the spokesman for the National District Attorneys Association in support of shifting to the defendant the burden of proving insanity rather than requiring the prosecution to prove the defendant's sanity beyond a reasonable doubt. *Id.* at 229-30, 1984 U.S. CODE CONG. & AD. NEWS at 3411 & n.31, 3412 (citing *Hearings on S. 829 Before the Subcomm. on Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 307-08 (1983)(statement of Edwin L. Miller, Jr., President-elect, National District Attorneys Association)) [hereinafter cited as *Hearings*]. *But see Hearings, supra* at 767-70 (American Bar Association Prepared Statement)(use of solely cognitive test did not necessitate allocating burden to defendant); *see also supra* note 79.

[132] *See Senate Report, supra* note 5, at 223-25, 1984 U.S. CODE CONG. & AD. NEWS at 3405, 3406 & nn.5 & 11, 3407 (prior federal law established in *Davis*).

[133] *See supra* text accompanying notes 126 and 131.

[134] *See supra* text accompanying notes 123, 132; *see also Stengel, supra* note 2, at 74 (shift in burden of proof to defendant reversed legal precedent established for more than 100 years).

[135] *See Senate Report, supra* note 5, at 225, 1984 U.S. CODE CONG. & AD. NEWS at 3407 (issues of allocation of burden of proof and appropriateness of standard did not raise constitutional ramifications indicating Congress had exceeded its legislative powers). Similarly, the Court in *Jones v. United States* had concluded:

> "[W]hen Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation . . . ." Marshall v. United States, 414 U.S. 417, 427, 94 S. Ct. 700, 706, 38 L. Ed. 2d 618 (1974). This admonition has particular force in the context of legislative efforts to deal with the special problems raised by the insanity defense.

Jones, 103 S. Ct. at 3053.

B. *Amendments of Rule 704 of the Federal Rules of Evidence: Legislative Legerdemain*

Prior to enactment of the Insanity Defense Reform Act, Rule 704 of the Federal Rules of Evidence provided that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[136] This form of Rule 704 was enacted in response to the problems raised by an earlier ultimate fact rule which prohibited an expert from expressing an opinion that would decide an issue.[137] Practical application of the ultimate fact rule had shown that such a restriction was difficult to apply and impeded the trier of fact from acquiring useful information and these difficulties led to the initial formulation of Rule 704.[138]

Rule 704 as amended reads as follows:

> Opinion on Ultimate Issue.
> (a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
> (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element

---

[136] FED. R. EVID. 704 (amended 1984); *see also* FED. R. EVID. 704 advisory committee note (1982)(Rules 701 and 702, as well as Rule 403, operate in conjunction with Rule 704). *See generally* 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 704[01]-[02] (1985)(ultimate fact rule abolished when Rule 704 enacted as integrated part of Article VII of Federal Rules of Evidence).

[137] See C. MCCORMICK, *supra* note 111, § 12, at 31 (illogical to claim that opinion testimony on ultimate issue would serve to usurp jury's role); 3 J. WEINSTEIN & M. BERGER, *supra* note 136, at ¶ 704[01] & advisory committee's note (because ultimate issue rule was unduly restrictive, trend in modern decisions was to abandon rule); *see, e.g.*, Feguer v. United States, 302 F.2d 214, 241-42 (8th Cir. 1962), *cert. denied*, 371 U.S. 872 (physician allowed to testify concerning defendant's ability to distinguish right from wrong).

[138] *See* Grismore v. Consolidated Products, 232 Iowa 328, 5 N.W.2d 646, 654-64 (1942)(court rejected argument that expert opinion testimony invaded province of jury). Among the impracticalities encountered in applying the ultimate issue rule were those that arise where, absent testimony as to ultimate facts, no testimony of value could be given, and those that arise when the courts try to separate testimony that involves factfinding from testimony that draws legal conclusions. 3 J. WEINSTEIN & M. BERGER, *supra* note 136, at ¶ 704[01]. *See* 7 WIGMORE, EVIDENCE § 1921 (Chadbourn rev. 1981)(potential for exclusion of most necessary testimony).

> of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.[139]

The stated congressional purpose behind this amendment was to eliminate the problem created when expert psychiatric witnesses give conflicting testimony relative to the ultimate legal issue.[140] The amendment precludes opinion testimony by a psychiatrist on a criminal defendant's mental state when the mental state constitutes "an *element of the crime* or of a defense thereto," reserving the determination of such ultimate issues for the trier of fact.[141] The Report of the Senate Judiciary Committee on the Insanity Defense Reform Act noted that "[u]nder this proposal, expert psychiatric testimony would be limited to presenting and explaining their diagnoses, such as whether the defendant had a severe mental disease or defect and what the characteristics of such a disease or defect, if any, may have been."[142] The Senate Judiciary Report quoted as an ably articulated premise for its evidentiary amendment a statement by the American Psychiatric Association that makes reference not only to diagnosis but also to mental state and motivation: "Psychiatrists, of course, must be permitted to testify fully about the defendant's diagnosis, mental state and motivation (in clinical and commonsense terms) at the time of the alleged act so as to permit the jury or judge to reach the ultimate conclusion about which they and only they are expert."[143] The Senate Report further acknowledged that the rationale for limiting the scope of opinion testimony by an expert psychiatrist had also been extended "to any ultimate mental state of the defendant that is relevant to the legal conclusion sought to be proven."[144]

---

[139] FED. R. EVID. 704; *see* Insanity Defense Reform Act § 406, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2067-68 (addition of section (b) to Rule 704); 3 J. WEINSTEIN & M. BERGER, *supra* note 136, at ¶ 704[03] (discussion of 1984 amendment to Rule 704).

[140] *Senate Report, supra* note 5, at 230, 1984 U.S. CODE CONG. & AD. NEWS at 3412.

[141] FED. R. EVID. 704(b)(emphasis added). *But cf.* 3 J. WEINSTEIN & M. BERGER, *supra* note 136, ¶ 704[03] (result of amended rule may be that experts use various indirect means to focus jury's attention on defendant's sanity).

[142] *Senate Report, supra* note 5, at 230-31, 1984 U.S. CODE CONG. & AD. NEWS at 3412.

[143] *Id.* at 3412-13 & n.33 (quoting *American Psychiatric Association Statement on the Insanity Defense* 14 (Dec. 1982)). The American Psychiatric Association recognized the potential for confusing, contradictory testimony that arises when an expert is asked to go beyond explaining medical premises and "infer or intuit what is in fact unspeakable, namely, the probable relationship between medical concepts and legal or moral constructs such as free will." *Id.*

[144] *Senate Report, supra* note 5, at 231, 1984 U.S. CODE CONG. & AD. NEWS at 3413. As examples of ultimate issues, the Committee included premeditation where the offense

At this point, the recurring problem of defining the constitutional boundary line between insanity and mens rea or criminal intent as an essential element of the crime has reappeared.[145] If a psychiatrist in a prosecution for deliberate homicide is limited in his presentation of ultimate opinion testimony on behalf of the accused criminal defendant who pleads insanity, and if access to evidence is thereby denied which could be used to disprove the defendant's mental state statutorily required for criminal culpability, does not a presumption of intent, or a shifting of the burden, arise? Such a shift would be found constitutionally impermissible under the *Winship* and *Mullaney* rulings which mandate that the burden is on the prosecution to prove beyond a reasonable doubt all the essential elements of criminality.[146] Moreover, four and one-half months after Congress enacted Federal Rule of Evidence 704(b)—a legislative slight of hand that resurrected both the ultimate issue rule and the "elements of the crime" dialogue from the *Winship* decision—the United States Supreme Court handed down *Ake v. Oklahoma*[147] and added a new twist.

IV. *Ake v. Oklahoma* and Rights of the Indigent

The Plot Thickens: Whither the Role of the Psychiatrist?

In an opinion written by Justice Marshall and delivered February 26, 1985, the United States Supreme Court resolved affirmatively the question "whether the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question."[148]

---

is homicide and lack of predisposition in a case involving entrapment. *Id.*

[145] *See supra* text accompanying notes 92-117.

[146] *See* Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 322, 340-48 (1980)(relationship of evidentiary devices to *Winship*'s mandate). The functional equivalence of presumptions and affirmative defenses has been recognized. *See id.* at 355-58 (illustrative explanation utilizing Sandstrom v. Montana, 422 U.S. 510 (1979)); *cf.* Hermann, *supra* note 7, at 266-67 (Court in Fisher v. United States, 328 U.S. 463 (1946), was confused by doctrine of partial responsibility when it affirmed exclusion by trial court of evidence indicating mental illness relevant to element of crime). *See generally* W. LAFAVE & A. SCOTT, *supra* note 7, § 21, at 146 (potential constitutional problems of affirmative defenses and rebuttable presumptions); C. MCCORMICK, *supra* note 111, §§ 346-348, at 987-1000 (affirmative defenses and presumptions in criminal context raise constitutional issues when compared with elements of crime).

[147] 105 S. Ct. at 1091; *see supra* notes 8-9 and accompanying text.

[148] *Ake*, 105 S. Ct. at 1097.

By a vote of seven to two, the Court held that after an initial demonstration by an indigent defendant which shows the significance at trial of the determination of sanity at the time of the crime, the state must provide, at a minimum, a competent psychiatrist whose function is not only to examine the defendant, but also to assist him in terms of the evaluation, preparation, and presentation of his defense.[149]

Upon arrest in late 1979, Glen Burton Ake was charged in the Oklahoma courts for the murder of a couple as well as the injuries sustained by the couple's two children.[150] At arraignment proceedings where Ake exhibited bizarre behavior, the trial judge, sua sponte, ordered that Ake undergo psychiatric examination.[151] Subsequently, the petitioner was confined, evaluated and determined by the state hospital's chief forensic psychiatrist to be lacking competency to stand trial; Ake was ordered committed.[152] Six weeks later, however, the chief forensic psychiatrist evaluated the defendant as competent to stand trial, attributing the new stability of Ake's mental condition to a steady dosage of antipsychotic drugs.[153] Counsel for Ake then petitioned the state to provide a psychiatrist to ascertain defendant's state of mind at the time of the offense because Ake, being indigent, did not have the financial resources for such services.[154] Ake's attorney argued unsuccessfully that the Constitution of the United States mandated such assistance if found essential to the defense.[155]

At trial, although insanity was Ake's sole defense, the question of his sanity at the time of the criminal offense was not evaluated by expert testimony for either the state or the defendant.[156] In Oklahoma, the test for insanity was defined in terms of ability to distinguish right from wrong.[157] Procedurally, Oklahoma law included a presumption of

---

[149] *Id.*.

[150] *Id.* at 1090.

[151] *Id.*

[152] *Id.* 1091. Ake was diagnosed as being a paranoid schizophrenic. *Id.*

[153] *Id.* Thorazine in 200 milligram dosages was administered to Ake three times a day. *Id.* Petitioner requested a writ of certiorari to settle the question of whether Thorazine affected him adversely so that he did not comprehend the trial proceedings and could not assist counsel in developing his defense. *Id.* at 1092 n.2. The Court, upon disposition of the case, did not have to resolve this issue. *Id.*

[154] *Id.* at 1091.

[155] *Id.*

[156] *Id.*

[157] OKLA. STAT. tit. 21, § 152 (1981) provided:

> All persons are capable of committing crimes, except those belonging to the following classes . . . (4) Lunatics, insane persons and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon

sanity which necessitated Ake's raising a reasonable doubt concerning his sanity before the burden shifted and the state was required to prove defendant's sanity beyond a reasonable doubt.[158] Ake was unsuccessful in establishing an insanity defense during the guilt portion of his trial, and he was unable at the sentencing proceeding to introduce any new evidence to rebut earlier psychiatric testimony concerning his potential for future dangerousness or to support any mitigating factors.[159] The jury imposed the death penalty.[160] The Oklahoma Court of Appeals refused Ake's request as an indigent facing charges of capital crimes for a ruling that the state should provide a psychiatrist appointed by the court.[161]

The United States Supreme Court, by grant of certiorari, reversed, exercising jurisdiction based on the fundamental character of federal constitutional error.[162] Justice Marshall, writing for the majority, first defined the constitutional context in which this case had arisen.[163] At issue was the Due Process Clause of the fourteenth amendment, which undergirded the right of the indigent defendant upon criminal prosecution to be able to fairly participate in his defense in a meaningful manner.[164] Under the Due Process Clause the indigent defendant must be

---

proof that at the time of committing the act charged against them they are incapable of knowing its wrongfulness.

Ake, 105 S. Ct. at 1092 (citing Oklahoma statute).

[158] *Ake*, 105 S. Ct. at 1092 & n.1 (citing Ake v. State, 663 P.2d 1, 10 (Okla. Crim. App. 1983)).

[159] *Ake*, 105 S. Ct. at 1091-92.

[160] *Id.* at 1092.

[161] Ake v. State, 663 P.2d 1, 6 (Okla. Crim. App. 1983).

[162] *Ake*, 105 S. Ct. at 1092. Oklahoma state law recognized that where federal constitutional rights were violated such errors were deemed fundamental. *Id.* (citing Buchanan v. State, 523 P. 2d 1134, 1137 (Okla. Crim. App. 1974)).

[163] *Ake*, 105 S. Ct. at 1093. The Court identified the following Supreme Court decisions in which rights were accorded indigents in criminal proceedings: Griffin v. Illinois, 351 U.S. 12, 17-20 (1956)(trial transcript must be provided indigent when necessary); Burns v. Ohio, 360 U.S. 252, 258 (1956)(no requirement of payment of fee by indigent prior to filing appeal); Gideon v. Wainwright, 372 U.S. 335, 342-45 (1983)(assistance of counsel at trial must be provided indigent defendant); Douglas v. California, 373 U.S. 353, 357-58 (1963)(assistance of counsel must be provided when indigent first appeals as of right). *Ake*, 105 S. Ct. at 1093. The *Ake* Court also acknowledged the constitutional requirement that assistance of counsel be effective. *Ake*, 105 S. Ct. at 1093 (citing Evitts v. Lucey, 105 S. Ct. 830, 836-37 (1985); Strickland v. Washington, 104 S. Ct. 2052, 2063-69 (1984); McMann v. Richardson, 397 U.S. 769, 771, n.14 (1970)). Further, the Court recognized an indigent's right to meaningful participation in the "quasi-criminal" context. *Ake* 105 S. Ct. at 1093 (citing Little v. Streater, 452 U.S. 1, 16-17 (1981)(in paternity action, putative father, if indigent, cannot be deprived blood grouping tests)).

[164] *Ake*, 105 S. Ct. at 1093.

provided access to the basic tools necessary to build an adequate defense.[165]

After having recognized the potentially serious impact on the defendant's liberty interest, the Court utilized the three factors of the *Matthews v. Eldridge*[166] test to determine whether psychiatric assistance was of such critical importance to the development of a defense that the state must facilitate access.[167] Analyzing the first factor, which focuses on the private interest affected, the Court found that the defendant's interest, as reflected in the risk to the individual of losing life or liberty depending on the accuracy of the trial, was a crucial consideration.[168] The Court evaluated the second factor, which reflects the interest of the state which would be affected, and rejected the state's argument of substantial financial burden in light of the fact that the state was also compelled to support the fairness and accuracy of criminal proceedings.[169] Finally, the Court considered the third *Matthews*

---

[165] *Id.* at 1094 (citing Britt v. North Carolina, 404 U.S. 226, 227 (1971)).

[166] 424 U.S. 319 (1976).

[167] *Ake*, 105 S. Ct. at 1094-95 (citing *Matthews*, 424 U.S. at 335)).

[168] *Ake*, 105 S. Ct. at 1094.

[169] *Id.* at 1094-95. The Court included extensive footnoting of various state statutory and judicial authorities which currently provided indigents with psychiatric assistance. *Id.* at n.4 (citing MISS. CODE ANN. § 99-15-17 (Supp. 1983)).

The *Ake* decision cited § 99-15-17 of the Mississippi Code in support for two statements. At one point, the Court noted:

> Numerous state statutes guarantee reimbursement for expert services under a like standard. [*Cf.* 18 U.S.C. § 3006A(e)]. And in many States that have not assured access to psychiatrists through the legislative process, state courts have interpreted the State or Federal Constitution to require that psychiatric assistance be provided to indigent defendants when necessary for an adequate defense, or when insanity is at issue.
>
> *Ake*, 105 S. Ct. at 1095 (footnote omitted).

In MISS. CODE ANN. § 99-15-17 (Supp. 1985), the statutory language does provide compensation limits for attorneys appointed to represent indigents and states that "[i]n addition, the judge shall allow reimbursement of actual expenses." *Id.* However, no Mississippi cases have construed § 99-15-17 in the specific context of providing psychiatric experts. *See* Billiot v. State, 454 So. 2d 445, 453 (Miss. 1984)(MISS. CODE ANN. § 99-15-17 lacks definition of "actual expenses"), *cert. denied*, 105 S. Ct. 1232 (1985). Moreover, the Mississippi Supreme Court has not interpreted its state constitution to require the provision of psychiatric assistance. In a pre-*Ake* decision, Phillips v. State, 197 So. 2d 241 (1967), *cert. denied*, 389 U.S. 1050 (1968) the Mississippi Supreme Court affirmed the trial court's denial of a motion by court-appointed counsel that a psychiatrist be provided to evaluate the indigent defendant's mental condition at the time of the offense and stated: "Neither the United States Constitution nor the Mississippi Constitution requires that the Nation or State furnish an indigent defendant with the assistance of a psychiatrist. The only assistance that they require is the assistance of legal counsel." *Id.* at 244; *see* Williams & Bost, The Assigned Counsel Systems: An Excuse or Servitude?,

factor, which focuses on the probable value of the proposed procedural safeguard and the risk of error upon denial of the safeguard.[170]

In weighing the probable value resulting from access to a psychiatrist as counterbalanced against risk of error if access were denied, the majority opinion first considered the importance of the role allotted to psychiatry in criminal proceedings, both at state and federal government levels, when experts are necessary for an adequate defense or when insanity is raised.[171] The Court then recognized psychiatric assistance as potentially crucial to the accused's ability to defend and enumerated the range of psychiatric activities applicable to the defense, including references to the role of psychiatrists in drawing conclusions concerning the mental state of the defendant and in offering opinions concerning the relationship of mental condition to behavior.[172] The

---

42 MISS. L.J. 42-44 (1971)(Mississippi Supreme Court in *Phillips* strictly interpreted "assistance of counsel").

The *Ake* court also cited § 99-15-17 in support of the following statement:

> Many States, as well as the Federal Government, currently make psychiatric assistance available to indigent defendants, and they have not found the financial burden so great as to preclude this assistance. This is especially so when the obligation of the State is limited to provision of one competent psychiatrist, as it is in many States, and as we limit the right we recognize today.

Ake, 105 S. Ct. at 1094-95 (footnote omitted).

However, psychiatric assistance has been made accessible to defendants for the purpose of determining mental competency by reference to MISS. CODE ANN. § 99-13-11 (1972). Section 99-13-11 grants to the trial court, when the defendant's mental condition is questioned, the power to select a psychiatrist to examine the defendant for the purpose of determining his ability to make a defense. *Id.* Additionally, § 99-13-11 has been judicially interpreted as not providing a defendant with a psychiatrist of his choice. *See* King v. Cook, 210 So. 2d 887, 889 (Miss. 1968), *affirmed on habeas*, 297 F. Supp. 99, 102 (N.D. Miss. 1969)(MISS. CODE ANN. § 2575.5 (Supp. 1966)[now MISS. CODE ANN. § 99-13-11] does not entitle defendant to psychiatrist of his choice); *cf.* Hill v. State, 339 So. 2d 1382, 1385 (Miss. 1976)(psychiatric examination ordered by state goes to question whether indigent defendant is mentally competent to conduct rational defense pursuant to § 99-13-11); *see also* MISS. UNIF. CRIM. R. CIR. CT. PRACTICE R. 4.08 (pretrial procedure for insanity defense requires court selection of competent psychiatrist pursuant to MISS. CODE ANN. § 99-13-11 (1972)).

[170] *Ake*, 105 S. Ct. at 1095.

[171] *Id.* at 1095. The Court noted that more than 40 states and the federal government have granted indigent defendants the assistance of a psychiatrist under certain circumstances. *Id.* As an example, the *Ake* Court acknowledged the federal right of indigent defendants to receive "the assistance of all experts 'necessary for an adequate defense.' " *Id.* at 1095 (citing subsection (e) of Criminal Justice Act, 18 U.S.C. § 3006A); *cf. also* United States v. Patterson, 724 F.2d 1128, 1129-31 (5th Cir. 1984)(per curiam)(analysis of 18 U.S.C. § 3006A(e)(1) required fingerprint expert to have been appointed in Mississippi bank robbery case).

[172] *Ake*, 105 S. Ct. at 1095-96. The Court developed several aspects of the role of

Court technically acknowledged possible limitations placed on such evidence by evidentiary rules but continued to emphasize the ability of psychiatrists to interpret medical diagnoses in language that will assist jurors in making informed decisions concerning a defendant's mental state at the time the alleged offense occurred.[173] Having noted the disparate psychiatric conclusions on legal insanity and the role of juries as ultimate finders of fact in resolving the complexity of varying psychiatric opinion, the Court termed psychiatric testimony a crucial necessity.[174] The Court again reviewed the actual psychiatric process involving examination, interpretation and presentation of analytic investigation, which the Court felt provided the jury the most accurate basis for determination of the insanity issue.[175] The Court neither approved nor disapproved the prevalent reliance placed upon psychiatrists by states and private individuals, preferring alternatively to recognize that it would be unfair to hold otherwise when the evolving practice of using psychiatric assistance is apparent.[176] The Court, in repeated emphasis, gave a final listing of appropriate psychiatric duties encompassing professional examination, an analysis of the viability of the defense, presentation of testimony, and assistance in the preparation of the cross-examination of psychiatric witnesses produced by the state.[177] The Court noted these procedures would offset the otherwise

---

psychiatrists: (1) gathering of facts; (2) analysis of information and development of plausible conclusions concerning the defendant's mental state; (3) formulation of opinions relating mental condition to behavior; (4) questioning of adversary's psychiatrists; and (5) dialogue with the jury explaining the relevancy of observations concerning the defendant's symptoms. *Id.*

[173] *Id.* at 1096.

[174] *Id.*

[175] *Id.* In footnote eight, the Court approved two positions that seem particularly out of step with the principles incorporated into the 1984 Insanity Defense Reform Act only four months earlier. *See supra* notes 3-4 and accompanying text. First, Justice Marshall cited authorities who declared expert and opinion evidence to be a necessity because of the complexities of modern civilization. *Ake*, 105 S. Ct. at 1096 n.8 (quoting 2 I. GOLDSTEIN & F. LANE, GOLDSTEIN TRIAL TECHNIQUES § 14.01 (2d ed. 1969)). *But cf.* FED. R. EVID. 704(b) (restricting ultimate opinion expert testimony); *see supra* text accompanying notes 139-44. Second, Justice Marshall noted authority "discussing the growing role of psychiatric witnesses as a result of changing definitions of legal insanity and *increased judicial and legislative acceptance of the practice.*" *Ake*, 105 S. Ct. at 1096 n.8 (emphasis added)(citing Henning, *The Psychiatrist in the Legal Process*, in BY REASON OF INSANITY: ESSAYS IN PSYCHIATRY AND THE LAW 217, 219-20 (L. Freedman ed. 1983)). *But see supra* notes 124-28 and accompanying text (legislative and judicial actions abolishing volitional tests because of problems with psychiatric testimony concerning capacity for control).

[176] *Ake*, 105 S. Ct. at 1096.

[177] *Id.* In United States v. Sloan, 776 F.2d 926, 929 (10th Cir. 1985), the court ex-

high risk of erroneously resolving sanity issues and concluded that the assistance of a psychiatrist allowed the defendant to make a fair and meaningful presentation to the jury.[178] The Court further discussed the requirement that the defendant make an ex parte threshold showing which presents to the trial court the significance of his sanity as a key factor in the preparation of a defense and thereby demonstrates the need for access to a psychiatrist.[179]

Upon a final weighing of the possible devastation of a defense deprived of psychiatric assistance against its possible success if assistance were provided, and upon recognizing the enhancement of potential accuracy to the jury decision, the Court concluded that the individual interest was superior to the state's.[180] The Court, in summation, elaborated on its holding by reemphasizing the following requirements: first, the defendant must show the significance at trial of the question of his sanity at the time he is alleged to have committed the offense; second, the state must then make a competent psychiatrist accessible to the

---

plained the ramifications of the court's duty to provide psychiatric assistance if the requisite showing of the significance of mental condition is made:

> That duty cannot be satisfied with the appointment of an expert who ultimately testifies contrary to the defense on the issue of competence. The essential benefit of having an expert in the first place is denied the defendant when the service of the doctor must be shared with the prosecution. In this case the benefit sought was not only the testimony of a psychiatrist to present the defendant's side of the case, but also the assistance of an expert to interpret the findings of an expert witness and to aid in the preparation of his cross-exam.

See United States v. Crews, 781 F.2d 826, 834 (10th Cir. 1986) ("Although four treating or court-appointed psychiatrists testified with respect to Crews' mental condition, Crews also was entitled to the appointment of a psychiatrist 'to interpret the findings of . . . expert witness[es] and to aid in the preparation of his cross-examination.' Sloan, at 929." (footnote omitted)). *But cf.* Martin v. Wainwright, 770 F.2d 918, 935 (11th Cir. 1985)(no suggestion in *Ake* of constitutional entitlement to favorable psychiatric opinion), o*pinion modified and reh'g denied*, 781 F.2d 185 (1986). Although confusion would appear to exist among the circuits concerning the implementation of the *Ake* standard, it is noteworthy that in *Ake* the Supreme Court stated that the constitutional right was limited to one competent psychiatrist. *Ake*, 105 S. Ct. at 1095.

[178] *Ake*, 105 S. Ct. at 1096. Justice Marshall wrote: *"With such assistance*, the defendant is fairly able *to present at least enough information to the jury, in a meaningful manner*, as to permit it to make a sensible determination." *Id.* (emphasis added). For a discussion of the potential conflict between Ake's broad substantive grant of psychiatric assistance and the narrowed scope of Federal Rule of Evidence 704, see the conclusion of this comment.

[179] *Ake*, 105 S. Ct. at 1097; *see* Caldwell v. Mississippi, 105 S. Ct. 2633, 2637 n.1 (1985)(no due process deprivation when compared with *Ake* standard because defendant offered merely undeveloped assertions).

[180] *Ake*, 105 S. Ct. at 1097 & n.9.

indigent defendant; and third, the duties of the psychiatrist are to "conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense."[181]

The focus of the *Ake* decision then shifted to the similar problems encountered in the capital sentencing proceeding when the state produced evidence relevant to a determination of defendant's future dangerousness.[182] By analogous reasoning, the Court found that the dictates of due process required that during the sentencing phase the defendant also have access to psychiatric assistance.[183] The Court then proceeded to distinguish *United States ex rel. Smith v. Baldi*,[184] which had been relied upon by the trial court in denying psychiatric assistance.[185] The Court utilized a factual, as well as a fundamental, distinction, noting the changes that had taken place since *Smith* in terms of the now-recognized constitutional protection of indigent defendants seeking fair and meaningful access to the courts and further noting the major influence of the psychiatric presence in criminal proceedings.[186]

---

[181] *Id.* at 1097. The Court elaborated that the right to competent psychiatric assistance did not give the defendant a constitutional prerogative to select a psychiatrist based on personal rapport nor to receive direct funding which would enable the defendant to engage a psychiatrist. *Id.* The Court delegated to the states the development of implementation procedures. *Id. But see* note 177 (confusion among circuits in implementing standard).

[182] *Id.* The Court stated that issue of future dangerousness is an aggravating factor under Oklahoma's capitol sentencing scheme. *See id.* at 1099 (citing OKLA. STAT. tit. 21 § 701.12(7)(1981)).

[183] *Ake*, 105 S. Ct. at 1097. The Court again utilized a three-pronged analysis, examining the individual's interest, the state's interest, and the balance of probable value to risk, and then noted judicial precedent recognizing the effectiveness of psychiatric testimony in determining future dangerousness. *Id.* (citing Barefoot v. Estelle, 463 U.S. 800, 899 n.5 (1983)); *see supra* text accompanying notes 166-80 (Court's use of the *Mathews v. Eldrige* test to evaluate guilt phase). The Court resolved the question of necessity of psychiatric assistance at sentencing in favor of the defendant for the following reasons: first, the risk of error carried major ramifications to the individual; second, the relevancy of psychiatric testimony, which could be utilized to respond to the prosecution's presentation of evidence of aggravating factors, was self-evident; and third, the state was not unduly burdened. *Ake*, 105 S. Ct. at 1097.

[184] 344 U.S. 561 (1953).

[185] *Ake*, 105 S. Ct. at 1097-98.

[186] *Id.* at 1098. The Court noted that in *United States ex rel. Smith v. Baldi* neutral psychiatric examination and testimony were present, and these facts in the record had influenced the Court's decision refusing additional assistance. *Id.* (citing *Smith*, 344 U.S. at 568). The Court further recognized that *Smith* predated the Court's recognition of indigents' right to presence of counsel in state proceedings. *Ake*, 105 S. Ct. at 1098. Additionally, the Court recognized that "neither trial practice nor legislative treatment of the role of insanity in the criminal process sits paralyzed simply because this Court has once addressed them, and we would surely be remiss to ignore the extraordinarily en-

Applying the facts of the case to the newly announced standard, the Court found that sufficient factors existed to indicate that the issue of Ake's sanity at the time of the alleged crime would play a substantial role in his defense and that the trial court had been notified of the insanity issue when the defendant petitioned for a court-appointed psychiatrist.[187] Additionally, the Court concluded that the question of future dangerousness became a significant factor at sentencing and that Ake's deprivation of the assistance of a psychiatrist at this stage violated the Due Process Clause.[188] Following the Court's reversal, Chief Justice Burger added a concurring opinion stressing the lack of any opportunity in this capital case for the indigent defendant whose legal sanity was seriously questioned to gain access to psychiatric evidence to support the insanity defense.[189] The Chief Justice cautioned that the majority's holding did not address non-capital cases.[190]

Justice Rehnquist dissented on the grounds that the rule of the Court should be applied only to capital cases and that the Court should "make clear that the entitlement is to an independent psychiatric evaluation, not to a defense consultant."[191] Setting out additional facts not mentioned in the majority opinion, Justice Rehnquist objected to the state's being required to provide a psychiatrist upon the evidence as shown, although he conceded that in certain situations within capital trials "fundamental fairness" would require the assis-

---

hanced role of psychiatry in criminal law today." *Id.* (footnote omitted). Again, the Court exhibited an apparent disregard or unawareness of the Insanity Defense Reform Act of 1984 when it declared that neither trial practice nor the legislative process operated in a state of paralysis. *See supra* note 175. In a footnote, the Court supported its recognition of the enhanced role of psychiatry by citing an article responding to legislation being considered by Congress in 1973. *Ake*, 105 S. Ct. at 1098 n.10 (citing Huckabee, *Resolving the Problem of Dominance of Psychiatrists in Criminal Responsibility Decisions: A Proposal*, 27 Sw. L.J. 790 (1973)).

[187] *Ake*, 105 S. Ct. at 1098. The Court reviewed the following factors: (1) insanity as Ake's sole defense; (2) sua sponte action by the trial judge to determine competency; (3) initial determination of the lack of competency and the subsequent committment; (4) competency acquired during the six-week period conditioned on sedation with Thorazine; (5) psychiatric testimony at the trial level reflecting serious mental illness was offered within six months of the alleged criminal acts; (6) Oklahoma initially assigned the burden of production to the defendant raising the insanity defense. *Id.* The Court noted that these factors were to be considered in the aggregate without elaboration as to any specific factors being necessary. *Id.* at 1099 & n.12.

[188] *Id.* at 1099 & n.13.

[189] *Id.* at 1099 (Burger, C.J., concurring).

[190] *Id.* (Burger, C.J., concurring).

[191] *Id.* (Rehnquist, J., dissenting).

tance of a court-appointed psychiatrist.[192] In his dissent, Justice Rehnquist also argued that it was highly doubtful whether due process placed upon the state the requirement to provide a criminal defendant with an insanity defense.[193] Justice Rehnquist, moreover, cited *Patterson v. New York* for the proposition that if the state does make such a defense available, the defendant may be allotted the burden of proof for insanity.[194] The Rehnquist dissent viewed the *Ake* decision as one in which the criminal defendant had not sustained his burden as required by state law.[195] Additionally, Justice Rehnquist declined to interpret due process to impose an overriding federal standard that would dictate the legitimate process for placing sanity in issue.[196] In

---

[192] *Id.* at 1099-101 (Rehnquist, J., dissenting). Some of the facts Justice Rehnquist reviewed included the details of the brutal killings; the subsequent multi-state crime spree which ensued; the 44-page statement of the crime which Ake subsequently signed in November, 1979; the initial absence of development of lack of competency to stand trial; the delay in Ake's evidencing any issue of sanity until February, 1980, at formal arraignment; the withdrawal by Ake's attorney of a motion requesting a jury trial to determine whether defendant was presently sane; a cellmate's testimony given outside the presence of the jury corroborating that Ake had indicated he was feigning insanity; and the absence of any lay witnesses being called or questioned by Ake in order to testify about his mental condition at the time of the alleged crimes. *Id.* Justice Rehnquist questioned the procedure for making the requisite preliminary showing of evidence which would implicate the question of sanity at the time of the offense as a significant trial issue. He stated that Ake did not carry his initial burden of proof under state law. *Id.*

[193] *Id.* at 1101 (Rehnquist, J., dissenting). Justice Rehnquist stated that "[i]t is highly doubtful that due process requires a State to make available an insanity defense to a criminal defendant, but in any event if such a defense is afforded the burden of proving insanity can be placed on the defendant. *See* Patterson v. New York, 432 U.S. 197 (1977)." *Ake*, 105 S. Ct. at 1101.

[194] *Ake*, 105 S. Ct. at 1101; *see supra* notes 191, 193.

[195] *Ake*, 105 S. Ct. at 1101 (Rehnquist, J., dissenting); *see supra* note 192; *see also* Bowden v. Francis, 105 S. Ct. 1834 (1985). In *Bowden*, the Court, after granting certiorari, remanded the decision to the Eleventh Circuit Court of Appeals for review according to the standards set forth in *Ake v. Oklahoma*. *Bowden*, 105 S. Ct. at 1834. In dissent, Justice O'Connor, joined by Justice Rehnquist and White, argued that the petitioner did not meet his burden of showing a significant doubt regarding his competency nor had he initially requested that a psychiatrist be provided to develop evidence of mitigating factors. *Id.* at 1834-35. (O'Connor, J., dissenting). On remand, the Court found no constitutional error because the defendant had not met the *Ake* requirement to make a showing that his sanity at the time of the offense would be a significant factor at trial nor did he request psychiatric assistance in presenting mitigating evidence during the sentencing phase. Bowden v. Kemp, 767 F.2d 761, 765 (11th Cir. 1985).

[196] *Ake*, 105 S. Ct. at 1101 (Rehnquist, J., dissenting). Justice Rehnquist articulated his position as follows: "I do not believe the Due Process Clause superimposes a federal standard for determining how and when sanity can legitimately be placed in issue, and I would find no violation of due process under the circumstances." *Id.* Justice Rehnquist further categorized the Court's discussion of the rule providing psychiatric assistance at

conclusion, Justice Rehnquist added the qualification that, assuming his agreement with the Court as to the propriety that the state be required to appoint a psychiatrist here, he would not support so broad an entitlement as "access to a competent psychiatrist who will conduct an appropriate examination *and assist in evaluation, preparation, and presentation of the defense.*"[197] Justice Rehnquist delineated the role of the psychiatrist as distinct from that of the attorney, relegated psychiatric opinion to being relevant to questions of fact only, confined the defendant's entitlement to one competent, independent psychiatric opinion and concluded that there was no reason that the right granted should provide the defendant with either an opposing view or a "defense" advocate.[198]

V. Conclusion

The Ake *Curtain Call: Is Rule 704(b) Left Standing in the Wings?*

Although the *Ake v. Oklahoma* decision focuses on state prosecution of an indigent defendant who raises the insanity defense, the decision has wide ramifications in terms of its constitutional mandate. The federal courts which must now analyze the insanity defense according to the statutory requirements of the Insanity Defense Reform Act of 1984 are also controlled by *Ake*. Can the new Rule 704(b) of the Federal Rules of Evidence, adopted in the 1984 Insanity Defense Reform Act, be synchronized with the *Ake* decision? Can Rule 704(b) be effectively implemented by the federal courts who must recognize *Ake*'s constitutional entitlement? These questions must also be addressed by states that have adopted evidentiary rules modeled upon the Federal Rules of Evidence.[199] The issue that must be resolved can be stated as follows: If a federal evidentiary rule precludes psychiatric opinion testi-

---

sentencing as dicta in view of Ake's having been granted the right to a new trial concerning his guilt. He also noted that the psychiatrists testified about future dangerousness as defense witnesses, and this testimony had not been initiated by the state. *Id.*

[197] *Id.* at 1101-02 (Rehnquist, J., dissenting).

[198] *Id.* at 1102 (Rehnquist, J., dissenting). Justice Rehnquist pinpointed any unfairness in these cases as being the result of the state alone hiring the only competent witnesses, but he noted that the one competent, independent psychiatric opinion provided the defendant should suffice regardless of the expert's conclusion. *Id.* Justice Rehnquist did acknowledge that the psychiatrist should be accessible to defense counsel for pretrial questions and trial testimony. *Id.*

[199] Mississippi has adopted Federal Rule of Evidence 704 without incorporating section (b). *See* In the Matter of the Adoption of the Mississippi Rules of Evidence, 474-77 So. 2d (Miss. Cases) XXVII, LXIII (1985) (court rules) (Rule 704 does not include section (b)).

mony on the mental state which includes intent or mens rea as a statutorily required element of the crime, can this rule be overridden by the substantive constitutional right of an indigent to meaningful psychiatric assistance in his defense because of the limits this evidentiary rule places on such assistance?[200]

---

[200] Two recent federal district court decisions have addressed aspects of this question. In United States v. Prickett, 604 F. Supp. 407, 409 (S.D. Ohio 1985), which was decided prior to *Ake v. Oklahoma*, the court addressed the issue whether Rule 704(b) could be applied at the trial of an accused who raised the insanity defense where the alleged crime occurred prior to October 12, 1984, the date on which Rule 704 was amended. The *Prickett* court concluded that the amendment was a procedural change that did not constitute an ex post facto violation. *Id.* at 410. In *Prickett*, 604 F. Supp. at 410, the court relied in part on Beazell v. Ohio, 269 U.S. 167 (1925), where the following statement was made: "Nor is a statute which changes the rules of evidence after the indictment so as to render admissible against the accused evidence previously held inadmissible [an ex post facto law]. Thompson v. Missouri, 171 U.S. 380 . . . ." *Beazell*, 269 U.S. at 171. A close reading of *Beazell*, however, as set forth below with additional underscoring for emphasis, could suggest that *Ake* with its constitutional delineation of the psychiatrist's substantive role in assisting in the accused's defense would impose constitutional limitations:

> But the statute of Ohio here drawn in question affects only the manner in which the trial of those jointly accused shall be conducted. *It does not deprive the plaintiff in error of any defense previously available, nor affect the criminal quality of the act charged.* Nor does it change the legal definition of the offense or the punishment to be meted out. The quantum and kind of proof required to establish guilt, and all questions which may be considered by the court and jury in determining guilt or innocence, remain the same.
>
> Expressions are to be found in earlier judicial opinions to the effect that the *constitutional limitation may be transgressed by alterations in the rules of evidence* or procedure. *See* Calder v. Bull, 3 Dall. 386, 390 [stating that law altering rules of evidence to allow different, or less, testimony is ex post facto]; Cummings v. State of Missouri, 4 Wall. 277, 326 [stating that ex post facto laws include those changing rules of evidence to allow conviction with less or different testimony than previously required]; Kring v. Missouri, 107 U.S. 221, 228, 232. And there may be *procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense,* or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition. Kring v. Missouri, 107 U.S. 221; Thompson v. Utah, 170 U.S. 343. But it is now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited. . . .
>
> Just what alterations of procedure will be held to be a sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition.

Beazell, 269 U.S. at 170-71 (emphasis added).

A second federal district court analyzed Rule 704(b) in a different factual context from that of the insanity defense and therefore no reference to *Ake v. Oklahoma* was

From a broad perspective, the Insanity Defense Reform Act narrows the insanity defense in the federal courts and restricts psychiatric opinion testimony. By contrast, *Ake* dwells on the breadth and importance of psychiatric testimony when the insanity defense is raised by an indigent and sets a constitutional requirement for providing an indigent defendant with meaningful assistance in preparing a defense. The tightening tenor of the Insanity Defense Reform Act can be found voiced in the *Ake* dissent where Justice Rehnquist echoed the approval in *Patterson v. New York* of insanity as an affirmative defense and the absence of due process deprivation. Moreover, Justice Rehnquist, in his dissent in *Ake*, would limit the role of expert psychiatric opinion testimony, focusing on its relevance in relation to fact questions, and prohibiting the extension of psychiatric assistance to the core of the indigent's defense, which action basically implicates the required mental state as it relates to criminal responsibility.

Justice Marshall, however, writing for the majority in the *Ake* decision, focused on the protection that must be given the indigent defendant "when the State has made the defendant's mental condition relevant to his criminal culpability."[201] This language evokes Justice Marshall's earlier dissents in *Rivera v. Delaware*, *Patterson v. New York*, and *Jones v. United States*, where the wavering line between mens rea and insanity seemed to hover at constitutionality. Judge Rubin, dissenting in *United States v. Lyons*, the recent Fifth Circuit decision which abrogated the volitional portion of the insanity standard, also acknowledged the role of mens rea in the context of insanity as basic to the establishment of criminal culpability.

In the brave new world of the Insanity Defense Reform Act, which severely limits the scope of psychiatric testimony relevant to the existence of mens rea as an element of the crime, yet another question remains: Has the enduring substantive versus procedural jousting be-

---

required. United States v. Frisbee, 623 F. Supp. 1217 (N.D. Cal. 1985). In *Frisbee*, the district court addressed the issue whether expert testimony is admissible under Rule 704(b) when the accused has alleged that because of pathological intoxication, organic brain damage, and alcoholic blackout or seizure, he was unable to form the specific intent required for first degree murder. The *Frisbee* court differentiated evidence offered for the purpose of negating specific intent from that offered to prove insanity. Although the *Frisbee* court did allow the evidence to be admitted on the issue of specific intent, it carefully circumscribed the scope and use of such proof. The court firmly stated that "[n]o testimony directly or indirectly opining on the issue of specific intent will be allowed." *Id.* at 1224. It is questionable whether such a decisive prohibition would be applied if the factual situation involved the insanity defense and the *Ake* constitutional standard concerning the psychiatrist's role in the defense.

[201] *Ake*, 105 S. Ct. at 1095.

tween mens rea and insanity been revived and tilted in the direction of the substantive by *Ake*, which constitutionally validates psychiatric assistance to prove the requisite mens rea when sanity at the time of the offense is seriously questioned? Clearly, judicial concerns addressing the basic constitutional premises of criminal culpability are juxtaposed against legislative policy enactments defining society's standard for criminal responsibility.

The potential effectiveness of section (b) of Rule 704 is questionable because it signifies a return to the ultimate issue rule which was rejected in section (a) of Rule 704 because of the practical problems of application. Moreover, by citing *Ake*, the criminal defendant can argue that it is questionable whether a psychiatrist can provide anything of value to the insanity defense when the psychiatrist is unable to fully testify to the defendant's mental state or mens rea when it constitutes an element of the crime. Counsel for the defendant who raises the insanity defense should invoke the constitutional protection of *Ake* when questions of the scope of psychiatric testimony arise under Rule 704(b). Although the lineage of *Ake* is built upon earlier decisions relative to rights accorded indigents in criminal proceedings and the *Ake* decision, as a state court prosecution, does not incorporate any reference to the Insanity Defense Reform Act, *Ake v. Oklahoma*, decided in February, 1985, holds the potential within the insanity context to eviscerate Federal Rule of Evidence 704(b) enacted only four months earlier.

Sally Baskin Buntin

RATIONAL BASIS REVIEW UNDER THE EQUAL PROTECTION CLAUSE—A DOUBLE STANDARD REVIEW—*CITY OF CLEBURNE, TEXAS V. CLEBURNE LIVING CENTER*

Introduction

In *City of Cleburne, Texas v. Cleburne Living Center*,[1] the Supreme Court vacated the judgment of the Court of Appeals for the Fifth Circuit[2] that classifications based on mental retardation were quasi-suspect warranting the intermediate level of scrutiny under the equal protection clause[3] and held that rational basis review was the appropriate standard to be applied.[4] Under this traditionally deferential analysis, the Court held that a Cleburne zoning ordinance, which required a special use permit for the operation of a group home for the mentally retarded in an "apartment house district,"[5] was unconstitutional as applied under the equal protection clause.[6] Though the Court purported to test the zoning ordinance under traditional rational basis review, the Court's scrutiny of the ordinance was more intense than that ordinarily employed under this level of review.[7] In applying the traditional rational basis test, the Court has upheld a classification "if any state of facts reasonably can be conceived that would sustain it."[8] However, in *Cleburne Living Center*, the Court refused to hypothesize a purpose that would be rationally related to the classification. Instead, the Court closely scrutinized the city council's objectives for the dis-

---

[1] *Cleburne Living Center*, 53 U.S.L.W. 5022 (U.S. 1985), *aff'ing in part and vacating in part* 726 F.2d 191 (5th Cir. 1984).

[2] Cleburne Living Center v. City of Cleburne, Texas, 726 F.2d 191 (5th Cir. 1984), *aff'd in part and vacated in part* 53 U.S.L.W. 5022 (U.S. 1985).

[3] *Id.* at 193.

[4] *Cleburne Living Center*, 53 U.S.L.W. at 5024.

[5] *Id.* at 5022. Specifically, the zoning ordinance required a special use permit for the construction of "hospitals for the insane or feeble-minded, or alcoholic or drug addicts, or penal or correctional institutions." *Id.* The city had classified the group home for the mentally retarded as a "hospital for the feeble-minded." *Id.* at 5022-23. The city council voted three-to-one to refuse a special use permit. *Id.* at 5023.

[6] *Id.* at 5026. The Court determined that the requirement of a special permit in this case was grounded on an irrational prejudice against the mentally retarded. *Id.*

[7] *See infra* text accompanying notes 139-46.

[8] Allied Stores of Ohio v. Bowers, 358 U.S. 522, 528 (1959).

criminatory classification in a manner that is more closely aligned with the intermediate level of review.[9]

Cleburne Living Center is not the first case in which the Court's actual intensity of review has been at variance with the articulated standard of analysis. Rather, the Court has applied a heightened scrutiny of review under the guise of the rational basis standard in an erratic fashion since *Reed v. Reed*[10] in 1971.

This comment will examine this unarticulated, heightened scrutiny, masquerading as traditional rational basis review, in the cases in which it has been applied. It will discuss the positions taken by the individual justices on the proper intensity of review to be applied under the rational basis test and the effect this heightened review will have on the lower courts and the attorneys seeking to challenge a classification under the equal protection clause.

Overview of the Standards of Review

The equal protection clause of the fourteenth amendment forbids a state to "deny to any person within its jurisdiction the equal protection of the laws."[11] In enforcing the commands of this clause, the Supreme Court has stated that the fourteenth amendment does not prevent the states from treating some people differently than others.[12] However, the Court has emphasized that the equal protection clause does deny the states the right to classify persons on the basis of criteria entirely unrelated to the purpose of the statute.[13] Over the years, the Court has developed three tests to determine the constitutionality of a statutory classification under the equal protection clause.[14] Through

---

[9] *See infra* text accompanying notes 151-62 and 167.

[10] 404 U.S. 71 (1971). *See* Gunther, *The Supreme Court 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 18-20 (1972)(discussing development of stricter standard of review under rationality requirement) [hereinafter cited as Gunther].

[11] U.S. Const. amend. XIV, § 1.

[12] *See* Plyler v. Doe, 457 U.S. 202, 216 (1982)(Constitution does not require states to treat things which are different as if they were alike); Reed v. Reed, 404 U.S. 71, 75 (1971)(recognizing that states have authority to classify different persons in different ways).

[13] *See* Reed v. Reed, 404 U.S. 71, 75-76 (1971)(discussing restriction imposed upon states by equal protection clause that legislation must not be based on factors which are totally unrelated to objectives of statute).

[14] *See* Burgdorf, A History of Unequal Treatment: The Qualifications Of Handicapped Persons As A "Suspect Class" Under The Equal Protection Clause, 15 Santa Clara Lawyer 855, 900-02 (1975)(discussion of standards Court has used in reviewing state acts which discriminate among classes of individuals); Comment, *Equal Protection*

these tests, the Court has applied different levels of scrutiny according to the subject matter of the classification. The strict scrutiny test is the highest level of review employed by the Court. Under this standard, a challenged classification must serve a "compelling state interest" to satisfy the requirements of the equal protection clause.[15] The Court has invoked the strict scrutiny test when a legislative enactment, or some other type of state action, has classified persons on the basis of criteria deemed "suspect"[16] or has infringed upon a "fundamental right" which is either expressly or impliedly guaranteed by the Constitution.[17]

An intermediate level of review has been applied by the Court to judge the legitimacy of legislative classifications based upon gender[18] or illegitimacy[19] or classifications imposing educational disabilities upon children of illegal aliens.[20] To pass equal protection muster under this test, the classification "must serve important governmental objectives and must be substantially related to achievement of those

---

And Gender-Based Discrimination: Michael M. v. Superior Court, 35 Sw. L.J. 947, 947-53 (1981)(examination of tests applied in equal protection analysis of state classifications).

[15] *See, e.g.*, Palmore v. Sidoti, 104 S. Ct. 1879, 1882 (1984)(suspect classifications must be justified by compelling governmental interest); Shapiro v. Thompson, 394 U.S. 618, 638 (1969)(classification tested under strict scrutiny review must promote compelling state interest). *See infra* text accompanying note 41.

[16] *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971)(legislation based upon alienage was held to be suspect classification); Loving v. Virginia, 388 U.S. 1, 11 (1966)(racial classification subjected to most rigid scrutiny); Oyama v. California, 332 U.S. 633, 640, 646 (1948)(classification based upon national origin was held to be suspect). *But see* Foley v. Connelie, 435 U.S. 291, 295-96 (1978)(statute based upon alienage was not subjected to strict scrutiny). The need for heightened review of suspect classifications was first articulated by Chief Justice Stone in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938): "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

[17] *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973)(stating that only rights which are "explicitly or implicity guaranteed by the Constitution" are to be deemed fundamental). See Shapiro v. Thompson, 394 U.S. 618, 660-62 (1969)(Harlan, J., dissenting), for a criticism of the fundamental rights branch of the strict scrutiny test. In Justice Harlan's opinion, the extension of the strict scrutiny test to fundamental rights placed the Court in the position of a "super-legislature." *Id.* at 661.

[18] *See* Craig v. Boren, 429 U.S. 190, 197 (1976)(applying intermediate level of scrutiny to classification based upon gender).

[19] *See* Mills v. Habluetzel, 456 U.S. 91, 99 (1982)(scrutinizing classification based upon illegitimacy under intermediate level of review).

[20] *See* Plyler v. Doe, 457 U.S. 202, 230 (1982)(applying intermediate scrutiny to classification discriminating against children of illegal aliens).

objectives."[21]

The minimum requirement the Court has imposed upon the states is that the legislative classification bear a reasonable relationship to a legitimate state interest.[22] The rational basis test has been applied by the Court in the area of economic and social welfare legislation.[23] Throughout the years, the Court has formulated and employed the rational basis test in significantly different ways. In *Lindsley v. Natural Carbonic Gas Co.*,[24] decided in 1911, the Court articulated a very lenient standard of review in its application of the rational basis test. The Court said that the state classification would be upheld under the equal protection clause as long as it rested upon any reasonable basis and was not totally arbitrary.[25] The Court further stated that if upon examination of the classification any facts reasonably could be conceived that would sustain the classification, the Court would assume the facts existed at the time the law was adopted.[26] The burden of demonstrating that the classification was irrational and purely arbitrary was placed upon the party contesting its constitutionality.[27] Nine years later, during the substantive due process period, the Court decided *Royster Guano Co. v. Virginia*,[28] employing the traditional rational basis test. However, the Court's approach diverged from the highly deferential analysis implemented in *Lindsley*, toward a stricter

---

[21] Craig v. Boren, 429 U.S. 190, 197 (1976).

[22] *See* Parham v. Hughes, 441 U.S. 347, 351 (1979)(legislative classifications must be rationally related to permissible state objective to satisfy requirements of equal protection clause); Dandridge v. Williams, 397 U.S. 471, 485 (1970)(statutory classifications grounded upon reasonableness do not offend Constitution).

[23] *See* Schweiker v. Wilson, 450 U.S. 221, 242 (1981)(social and economic legislation must bear rational relationship to legitimate governmental purpose in order to meet standards of equal protection clause); Jefferson v. Hackney, 406 U.S. 535, 546 (1972)(economic and social welfare classifications will be upheld under equal protection clause if rationally based).

[24] 220 U.S. 61 (1911).

[25] *Id.* at 78.

[26] *Id.*

[27] *Id.* at 78-79.

[28] 253 U.S. 412 (1920). During the substantive due process period, the Court substituted its judgment in place of the judgment of state legislatures in cases involving the exercise of the state police power. Leedes, *The Rationality Requirement of the Equal Protection Clause*, 42 OHIO ST. L.J. 639, 642-43 (1981)(during first part of twentieth century, Court substituted its subjective judgment for that of state legislature through rationality requirement); *cf.* Trimble v. Gordon, 430 U.S. 762, 785 (1977)(Rehnquist, J., dissenting)(*Royster Guano* standard employed during period in which Court gave expansive reading to equal protection clause in order to invalidate legislation); *see, e.g.*, Lochner v. New York, 198 U.S. 45, 64 (1905)(invalidating state legislation restricting number of hours per week bakery workers could be employed).

level of review. In reviewing the challenged classification, the Court stated that in order to meet the criteria of the rational basis test, the classification must bear a fair and substantial relation to the purpose of the law.[29] Through the implementation of the stricter rational basis test of *Royster Guano*, the Court struck down several state regulations on the basis that the classifications did not have a fair and substantial relation to the object of the law.[30] During this period, the Court independently scrutinized the reasonableness of governmental classifications and found many arbitrary and irrational. The Court's employment of the *Royster Guano* rational basis test proved to be short-lived when the Court reverted to the more lenient rational basis standard articulated in *Lindsley* after 1937.[31] The deferential analysis reigned as *the* test for rational basis review and what had once been a judicially independent analysis again became a "rubber stamp" approval of virtually all social and economic legislation. The only case in which the Court struck down an economic regulation as irrational after 1937 was *Morey v. Doud*[32] which was later overruled by the Court in *City of New Orleans v. Dukes.*[33]

Until the 1960's, the Court applied the rational basis test in reviewing most governmental classifications under the equal protection clause. Except for the racial discrimination cases where the Court applied a higher level of review,[34] the Warren Court continued the tradi-

---

[29] *Royster Guano*, 253 U.S. at 415.

[30] *See, e.g.*, Colgate v. Harvey, 296 U.S. 404, 424 (1935)(finding statutory classification had no substantial or fair relation to purpose of law); Frost v. Corporation Comm'n of Oklahoma, 278 U.S. 515, 524-25, 528 (1928)(statutory amendment declared unconstitutional under equal protection clause because it failed to meet "fair and substantial relation" requirement); Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37, 39 (1921)(statutory classification held invalid under equal protection clause because it did not bear fair and substantial relation to object of law).

[31] *See* Leedes, *The Rationality Requirement of the Equal Protection Clause*, 42 Ohio St. L.J. 639, 643 (1981)(after 1937, Court realized error of its ways and deferred to legislative judgment when statutes were attacked under equal protection clause).

[32] 354 U.S. 457 (1957), *overruled*, City of New Orleans v. Dukes, 427 U.S. 297 (1976). *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 320 (1976)(Marshall, J., dissenting)(*Morey v. Doud* is only modern case in which Court has invalidated economic classification because it was irrational); Weidner, *The Equal Protection Clause: The Continuing Search for Judicial Standards*, 57 U. Det. J. Urb. L. 867, 868 n.6 (1980)(*Morey v. Doud* is only case in which statutory economic regulation has been invalidated on equal protection grounds since 1937).

[33] 427 U.S. 297, 306 (1976).

[34] *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 192-96 (1964)(applying strict scrutiny to racial classification embodied in criminal statute which forbade unmarried interracial couples to cohabitate in same room at night); Brown v. Bd. of Educ., 347 U.S. 483,

tion of deferring to legislative judgment when a statutory classification was attacked under the equal protection clause.[35] As Chief Justice Warren said in *McDonald v. Board of Election Commissioners*,[36] in which the rational basis standard was applied, "statutory classifications will be set aside only if no grounds can be conceived to justify them."[37]

It was not until the last decade of the Warren Court era that the Court engaged in an expansive reading of the equal protection clause.[38] In the 1960's, the Warren Court subjected other types of legislation, besides racial classifications, to the strict scrutiny test under the equal protection clause. Statutes which infringed upon fundamental rights[39] or which classified on the basis of "suspect" criteria[40] triggered the application of the strict scrutiny test. Under this stringent standard of review, the Court requires that the state demonstrate that the statutory classification is "necessary to promote a *compelling* governmental interest."[41] The Warren Court did not expand suspect classifications beyond race and national origin. It was the fundamental rights branch of the new equal protection which received the most criticism from commentators. "It was the element which bore the closest resemblance to freewheeling substantive due process, for it circumscribed legislative choices in the name of newly articulated values that lacked clear sup-

---

495 (1954)(invalidating state laws which segregated children in public schools on basis of race on equal protection grounds). Professor Gunther states that, at the beginning of the 1960's, judicial intervention "was virtually unknown outside racial discrimination cases." Gunther, *supra* note 10, at 8.

[35] *See, e.g.*, McGowan v. Maryland, 366 U.S 420, 425-26 (1961)(stating that state legislatures are presumed to have acted constitutionally despite fact that, in practice, their laws result in some inequality); Allied Stores of Ohio v. Bowers, 358 U.S. 522, 528 (1959)(emphasizing that classification is not violative of equal protection clause if any state of facts reasonably can be conceived that would sustain it); Williamson v. Lee Optical, 348 U.S. 483, 489 (1954)(holding that legislative reform may be taken in piecemeal fashion, addressing itself to phases of problem which seem most acute to legislative mind).

[36] 394 U.S. 802 (1969).

[37] *Id.* at 809.

[38] For a discussion of the Warren Court and its development of an interventionist stance under the equal protection clause see Gunther, *supra* note 10, at 8-10; Weidner, *supra* note 32, at 867-71.

[39] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 629-30, 638 (1969)(recognizing right of interstate travel as fundamental right); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966)(finding right to vote to be fundamental); Griffin v. Illinois, 351 U.S. 12, 20-21 (1956)(Frankfurter, J., concurring)(establishing that right to criminal appeals was constitutionally protected). *See supra* note 17.

[40] *See supra* note 16.

[41] Shapiro v. Thompson, 394 U.S. 618, 634 (1969)(emphasis supplied by the Court).

port in constitutional text and history."[42] The fears of many commentators that the open-ended nature of the fundamental rights doctrine would produce a wide selection of protected rights[43] were quelled when the Burger Court in *San Antonio Independent School District v. Rodriguez*[44] construed this branch of strict scrutiny narrowly. In this case, the Court held that fundamental rights are those rights explicitly or implicitly guaranteed by the Constitution.[45] Though the Court had given no hint of when it considered a right "implicitly" safeguarded by the Constitution, it has made no additions to the list of fundamental rights since *Rodriguez*. Similarly, the Burger Court has refrained from greatly expanding the suspect class aspect of the strict scrutiny standard. The only other group the Court has recognized as a suspect class is alienage.[46] In explaining why particular classes are not considered to be suspect, the Court has defined the criteria necessary for a group to qualify as a suspect class: the class must be "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command

---

[42] Gunther, *supra* note 10, at 8. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 630 (1969)(Court stated that it had no occasion to ascribe source of right of interstate travel to any constitutional provision).

[43] *See* Weidner, *supra* note 32, at 870 (fundamental rights doctrine viewed by some as invitation to expand spectrum of fundamental rights); *see also* Gunther, *supra* note 10, at 8-9 (large volume of commentary written about fundamental rights branch of strict scrutiny and possible areas to which it would be extended).

[44] 411 U.S. 1 (1973).

[45] *Id.* at 33-34.

[46] *See* Graham v. Richardson, 403 U.S. 365, 371-72 (1971)(Justice Blackmun stated that because aliens are a "prime example of a discrete and insular minority," classifications disfavoring them are "inherently suspect and subject to close scrutiny"). Since *Graham v. Richardson*, the Court has retreated from its position that classifications based on alienage are subject to strict scrutiny. In a series of cases, the Court declined to apply the most exacting judicial review and asserted that the appropriate standard of review was rational basis review. *See, e.g.*, Ambach v. Norwich, 441 U.S. 68, 80 (1979)(applying rational basis review to statute which prohibited certification as public school teacher of any alien unless that person had demonstrated intention to apply for citizenship); Foley v. Connelie, 435 U.S. 291, 296 (1978)(invoking rational basis review for statute that excluded aliens from employment as state troopers). The reasoning behind the Court's application of rational basis review to some alienage classifications is found in Sugarman v. Dougall, 413 U.S. 634, 646-47 (1973), in which the Court stated that a state may exclude aliens from governmental positions where officials "perform functions that go to the heart of representative government." Consequently, classifications which affect aliens' economic interests will be subjected to strict scrutiny while classifications which relate to the political function will be subjected to rational basis review. For the two-part test adopted by the Court to determine if a particular classification serves political goals, see Cabell v. Chavez-Salido, 454 U.S. 432, 440 (1982).

extraordinary protection from the majoritarian political process."[47] Perhaps the reason for the Burger Court's refusal to expand the categories of either rights deemed fundamental or classes deemed suspect is that the application of the strict scrutiny test invariably results in the statute being invalidated.[48] Therefore, whether a statute can withstand an equal protection challenge largely depends upon whether it is subject to strict scrutiny or rational basis review. This rigid two-tiered standard of review presented difficulties in equal protection analysis. Since the Court was hesitant to employ strict scrutiny review, most statutory classifications survived an equal protection challenge due to the application of the highly deferential rational basis review.

The Court's growing dissatisfaction with the two-tiered approach to equal protection analysis[49] resulted in the adoption of an intermediate level of review in *Craig v. Boren*[50] in 1976. Under this level of review, the Court scrutinizes the actual purpose of the classification instead of hypothesizing a reasonable legislative objective. In addition, the state must prove that the classification bears a substantial relation to a legitimate legislative purpose.[51] The decision to apply the interme-

---

[47] San Antonio Indep. School Dist. V. Rodriguez, 411 U.S. 1, 28 (1973).

[48] *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318-19 (1976)(Marshall, J., dissenting)(stating that Court is reluctant to expand categories of rights and classes subject to strict scrutiny because employment of strict scrutiny nearly always results in challenged statute being struck down).

[49] *See* Craig v. Boren, 429 U.S. 190, 210 (1976)(Powell, J., concurring)(dissatisfaction with two-tier analysis under equal protection clause pervades Court's decisions in past ten years).

[50] 429 U.S. 190 (1976). *Craig* involved an age-gender classification. An Oklahoma statute prohibited the sale of 3.2% beer to males under 21 years of age but permitted sales to females over 18 years of age. *Id.* at 191-92. In striking down the statute the Court employed an intermediate standard of review. *Id.* at 197. In articulating this test, Justice Brennan referred to Reed v. Reed, 404 U.S. 71 (1971), and stated that it was controlling. *Craig*, 429 U.S. at 199. *See infra* text accompanying notes 55-57. Justice Brennan treated the new standard of review as if it had been implemented by the Court since *Reed* wherein the Court cited and quoted from Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). *Craig*, 429 U.S. at 197-99. *See supra* notes 28-30 and accompanying text. Justice Rehnquist, with whom Chief Justice Burger dissented, thought the test was a drastic change and stated that the new test came out of "thin air." *Craig*, 429 U.S. at 220. Justice Rehnquist was opposed to the adoption of another standard of review because he thought the Court had enough problems with the two standards of review previously recognized by the Court. *Id.* at 220-21. Justice Rehnquist questioned how the Court was going to divine what objectives were important and whether a law was substantially related to the achievement of such objectives. The standard of review was criticized by Justice Rehnquist as being so diaphanous and elastic as to invite subjective judicial preferences relating to certain types of legislation. *Id.*

[51] *Craig*, 429 U.S. at 197. *See supra* text accompanying note 21.

diate standard of review, unlike the rational basis or strict scrutiny standards, does not automatically determine the outcome of the case. Instead, the end result depends upon the particular facts of the case to which the standard is applied. Unfortunately, the Court has not been consistent in its invocation of the middle tier of review. The Court often returns to the two-tiered analysis when intermediate review seems more appropriate.[52] In other cases, the Court has applied the heightened level of scrutiny though its express rationale has adhered to rational basis review.[53] As with the strict scrutiny standard, the Court appears reluctant to expand the number of classes subject to intermediate review beyond those previously recognized as quasi-suspect.[54] Instead, the Court seems to prefer to hide behind a thin veil of intellectual dishonesty by outwardly adhering to rational basis review while actually applying intermediate review.

The Two Faces of Rational Basis Review

The year of 1971 was the year which marked the schizophrenic development of the two faces of rational basis review. It was the year in which the Court decided *Reed v. Reed*[55] wherein the Court struck down a state statute which gave mandatory preference to males over females in the appointment of intestate administrators.[56] Although the Court purported to apply the traditional rational basis review, it cited *Royster Guano Co. v. Virginia* and stated that a classification must "rest upon some ground of difference having a fair and substantial relation to the object of the legislation."[57] The Court then proceeded to scrutinize the actual purpose asserted as justifying the classification—to reduce the workload of probate courts—and after conceding that the objective was not without some legitimacy, unanimously held that it was an arbitrary legislative decision prohibited by the equal

---

[52] *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 311-14 (1976)(Court, without considering possibility of using intermediate review, rejected application of strict scrutiny standard to statute which classified on basis of age and invoked rational basis review); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28-33, 40, 44 (1973)(Court reverted to two-tier analysis rather than applying intermediate review to school financing scheme).

[53] *See infra* notes 55, 61, 69, 74, 82, 88, 111 and accompanying text. *See supra* note 1 and accompanying text.

[54] *See supra* notes 18, 19, 20 and accompanying text.

[55] 404 U.S. 71 (1971).

[56] *Id.* at 76-77.

[57] *Id.* at 76.

protection clause.[58] Under traditional rational basis review the statute surely would have survived the judicial inquiry. However, the Court refused to invoke its imagination to find a reasonable legislative objective for the classification. The Court continued to apply this intensified rational basis scrutiny to gender classifications[59] until 1976 when it expressly acknowledged an intermediate standard of review for such classifications.[60]

In the years following *Reed*, the Burger Court erratically applied the more exacting standard of rational basis review to a diversified group of cases. For example, in *Eisenstadt v. Baird*,[61] the Court invalidated a law prohibiting distribution of contraceptives to unmarried persons for the purpose of preventing pregnancy.[62] Justice Brennan's majority opinion indicated that the Court was applying the deferential rational basis test[63] but it is apparent that a more intensified analysis was being employed. First, the Court quoted the "fair and substantial" language of *Reed* as the requirement of rational basis review.[64] The Court then closely examined the state interests advanced as the objectives of the statute. One asserted purpose of the law was the prevention of premarital sex.[65] The Court admitted that the state could, con-

---

[58] *Id.*

[59] *See, e.g.*, Stanton v. Stanton, 421 U.S. 7, 14, 17 (1975)(applying "fair and substantial relation" test to invalidate statute which specified greater age of majority for males than it specified for females for purposes of parental support payments); Weinberger v. Wiesenfeld, 420 U.S. 636, 648, 651-53 (1975) (after analyzing actual purpose of statute, Court held that gender-based classification violated due process clause of fifth amendment).

[60] *See supra* text accompanying notes 50 and 51. The Court's treatment of classifications which discriminated against illegitimates followed a similar pattern. Initially, the Court employed a heightened level of scrutiny in the name of rational basis review to such classifications. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 767, 776 (1977)(stating that rational basis scrutiny is more than toothless and striking down classification based on illegitimacy); Mathews v. Lucas, 427 U.S. 495, 506, 510 (1976)(refusing to apply strictest standard of review to illegitimacy classifications but emphasizing that rational basis review is not toothless). Then in Pickett v. Brown, 462 U.S. 1, 8 (1982), the Court acknowledged that it had applied a heightened level of scrutiny to classifications based on illegitimacy and invoked the "fair and substantial relation" language of Reed v. Reed.

[61] 405 U.S. 438 (1972).

[62] *Id.* at 440-43.

[63] *Id.* at 447 n.7. Justice Brennan spoke for four members of the Court: Justices Douglas, Stewart, Marshall, and himself. Justice White filed an opinion concurring in the result in which Justice Blackmun joined. *Id.* at 455. Chief Justice Burger filed a dissenting opinion. *Id.* at 460. Justices Powell and Rehnquist did not participate in the decision of the case. *Id.* at 455.

[64] *Id.* at 446-47.

[65] *Id.* at 448.

sistent with the equal protection clause, treat the problems of extramarital and premarital sexual relations differently, but nevertheless rejected this objective as the actual purpose of the statute.[66] The second objective advanced by the state, to regulate medically harmful substances, was rejected by the Court in a similar fashion.[67] Thus, two conceivable purposes were advanced by the state and the Court refused to adopt either as a reasonable legislative purpose or to imagine any rational objective. This intensified analysis by the Court clearly demonstrates that it had gone beyond the deferential scrutiny ordinarily applied under the lowest standard of review despite the fact the Court explicitly purported to apply the most lenient level of review.[68]

In the same year *Eisenstadt v. Baird* was decided, the Court subjected a state recoupment statute to a stringent examination under the guise of rational basis review in *James v. Strange*.[69] In that case, a state statute provided for the recovery from indigent criminal defendants of legal fees expended by the state.[70] The Court unanimously held that the statute violated the equal protection clause because it denied indigent defendants in debt to the state the exemptions provided to other judgment debtors.[71] Though the Court stated that the equal protection clause only required that there be "some rationality" to the differential treatment of the judgment debtors,[72] it closely scrutinized the statute for a rational explanation. The Court recognized that recoupment statutes served important state interests in preventing the fraudulent concealment of assets and false claims of indigency but stated that these interests would not be frustrated by requiring equal treatment of indigent defendants with other judgment debtors.[73] Thus, the

---

[66] *Id.* at 448-50. The Court refused to assume that the Massachusetts legislature intended to punish premarital sexual relations by forced pregnancy and the birth of an unwanted child. *Id.* at 448.

[67] *Id.* at 450-52. Chief Justice Burger criticized the majority for rejecting the asserted purpose of protecting health. The Chief Justice stated that absent overwhelming and irrefutable reasons for its actions, the Court had acted beyond its authority when it dismissed the Massachusetts Supreme Judicial Court's determination that the statute was meant to serve the state's interest in protecting its citizens' health. *Id.* at 467-68. The majority had infringed upon the constitutional rights of the states and returned to the days of substantive due process, according to Chief Justice Burger. *Id.* at 467.

[68] *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 103-04 (1974)(Marshal, J., dissenting)(arguing Court applied heightened level of scrutiny in *Eisenstadt* rather than highly tolerant rational basis review).

[69] 407 U.S. 128 (1972).

[70] *Id.*

[71] *Id.* at 134-35, 140-41.

[72] *Id.* at 140.

[73] *Id.* at 141.

Court was unwilling to strain its imagination to perceive a conceivable justification for the disparate treatment of indigent defendants and civil judgment debtors.

A year later, in 1973, in *United States Department of Agriculture v. Moreno*,[74] the Court considered the constitutionality of a section of the Food Stamp Act which denied food stamps to any household that had unrelated persons living therein.[75] Justice Brennan, writing for six members of the Court, stated that the rational basis test was the appropriate standard of review to be applied.[76] The Court's analysis, however, was again more rigorous than the articulated standard usually requires. Upon searching the legislative history for a legitimate governmental interest, the Court determined that Congress intended to deny "hippie communes" the benefit of food stamps and emphatically rejected this as a reasonable governmental objective.[77] Nevertheless, the government argued that the classification should be sustained because Congress conceivably could have thought that by excluding households comprised of unrelated persons from the food stamp program, fraud in the administration of the program would be reduced.[78] Though Justice Douglas[79] in his concurrence and Justice Rehnquist in his dissent[80] ac-

---

[74] 413 U.S. 528 (1973).

[75] *Id.* at 529.

[76] *Id.* at 533.

[77] *Id.* at 534-35.

[78] *Id.* at 535-36.

[79] *Id.* at 542-43 (Douglas, J., concurring). Justice Douglas concurred in the holding of the majority opinion but he would have invalidated the provision of the Food Stamp Act on the grounds that it infringed upon the first amendment right of association. *Id.* at 543. Justice Douglas indicated that if it were not for the fact the case touched upon associational rights, he would have voted to sustain the classification as a reasonable measure to prevent fraud. *Id.* at 544.

[80] *Id.* at 545-47 (Rehnquist, J., dissenting). Justice Rehnquist, with whom the Chief Justice concurred, disagreed with the Court's analysis. He stated that regardless of the fact that the Court could effectively argue that what it conceived to be the purpose of the act would not be significantly furthered by the enactment, this was a legislative function and the Court's only role was to determine whether there was any rational basis for the classification. *Id.* at 545-46. The application of the rational basis test by Justice Rehnquist followed the deferential analysis the Court has traditionally employed in the social welfare and economic area of legislation. *See, e.g.*, Richardson v. Belcher, 404 U.S. 78, 81-82, 84 (1971)(upholding classification in area of social welfare after cursory analysis under traditional rational basis review); Dandridge v. Williams, 397 U.S. 471, 485-86 (1970)(sustaining administrative regulation which imposed maximum limit on amount of monetary aid any family could receive from federal program on basis that classification does not violate equal protection clause because it "is not made with mathematical nicety, or because in practice it results in some inequality")(quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)).

cepted the assertion as a rational Congressional purpose, the majority of the Court disagreed. Justice Brennan scrutinized the classification and held that it did not rationally effectuate the prevention of fraud and that it was totally without any rational basis.[81] Once again the Court had searched for the actual purpose of the act and had refused to uphold the classification on the basis of a fictitious governmental interest.

In 1974, the Court decided *Johnson v. Robison.*[82] The case involved a federal act which provided educational benefits to veterans who had served on active duty in the armed forces, but denied such benefits to conscientious objectors who had performed alternative civilian service.[83] The Court stated that the traditional rational basis test was the standard to be employed, but specifically invoked the language of *Royster Guano Co.* and *Reed v. Reed.*[84] Justice Brennan expressed the view of eight members of the Court and said that the Court's duty was to determine whether the discriminatory treatment of conscientious objectors who had performed alternative civilian service had a fair and substantial relation to the stated purposes of the law.[85] Finding that the primary purpose of the enactment was to compensate those who had served on active duty in the armed forces for the disruption of their civilian lives, the Court held that the fifth amendment due process clause had not been violated.[86] The Court reasoned that since conscientious objectors were not required to leave civilian life to perform their service, the classification rested upon a reasonable Congressional objective.[87]

---

[81] *Moreno*, 413 U.S. at 537-38. Justice Brennan stated that the provision of the act denied food to persons who were not likely to defraud the program and who were so desperately in need of aid that they could not afford to change their living situation so as to remain eligible for assistance. *Id.* at 538.

[82] 415 U.S. 361 (1974).

[83] *Id.* at 362-63.

[84] *Id.* at 374-75 and n.14.

[85] *Id.* at 376. Congress listed the express objectives of the classification in the statute. The objectives included enhancing and making more appealing services in the armed forces, providing higher education to qualified and deserving individuals who might not otherwise be able to obtain such an education, helping service men and women adjust to civilian life by providing educational opportunities, and assisting these veterans in realizing their vocational and educational goals which they might have reached had they not served in the armed forces. *Id.*

[86] *Id.* at 377, 381-82. The fifth amendment prohibits discrimination that is so egregious as to be a violation of due process. *Id.* at 364 n.4. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954)(Court applied equal protection concept to federal government through due process clause of fifth amendment).

[87] *Johnson*, 415 U.S. at 381-82.

Another illustration of the Court's employment of a heightened level of scrutiny, masked as rational basis review, appears in *Zobel v. Williams*.[88] In that case, the Court struck down a statutory scheme which provided for the distribution of income derived from the state's natural resources to adult citizens in different amounts, depending upon the length of time each citizen had resided in the state.[89] In considering the constitutionality of the challenged classification, the Court independently examined the three purposes advanced by the state as justifying the discrimination against the state's newer citizens.[90] As noted by Justice Rehnquist in his dissent, the statute could have survived equal protection analysis on the basis that the classification rationally furthered the state objective of recognizing the various contributions which residents had made during their years of residency.[91] The majority of the Court, however, held that this was not a legitimate state purpose and that since the state had failed to show any valid state interest which was rationally related to the disparate treatment accorded its newer and older citizens, the statute was invalid under the equal protection clause.[92] The Court's analysis in this case and in the previously discussed cases is at odds with the articulated standard of review. Traditionally, the Court has engaged in judicial hypothesizing to sustain a statute under the rational basis test.[93] Yet in each case the

---

[88] 457 U.S. 55 (1982).

[89] *Id.* at 56, 65. Due to the discovery of large oil reserves on state-owned land in Alaska, the state received a tremendous amount of money from the sale of petroleum. In response to this good fortune, the state legislature enacted a dividend program for the annual distribution of proceeds from a fund containing 25% of annual mineral income to the Alaskan citizens. Under this system, each adult citizen received one dividend unit for each year of residency since 1959. *Id.* at 57.

[90] *Id.* at 61. The three purposes asserted by the state were 1) the creation of a financial incentive for persons to move and establish residency in Alaska; 2) the encouragement of careful management of the Permanent Fund; and 3) the division and distribution of benefits in acknowledgment of tangible and intangible contributions made by citizens during their years of residency. *Id.*

[91] *Id.* at 83 (Rehnquist, J., dissenting). Justice Rehnquist admonished the Court for acting beyond its constitutional authority by imposing upon the state its ideas of what constitutes wise economic or social policy. *Id.* at 84. *Cf.* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)(equal protection clause does not seize from state its power to classify in enactment of police laws and permits broad range of discretion in that regard).

[92] *Zobel*, 457 U.S. at 61, 63, and 65.

[93] *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 426 (1961)(stating that statutory classifications will not be invalidated if any facts reasonably can be conceived to sustain them); Williamson v. Lee Optical, 348 U.S. 483, 489-91 (1954)(engaging in judicial hypothesizing to sustain state regulation which discriminated against opticians in favor of opthalmologists).

Court rejected this approach and closely scrutinized what it deemed to be the actual purpose of the statute.[94] The Court refused to acknowledge that it had employed a more exacting scrutiny to the challenged classifications, steadfastly purporting to apply traditional rational basis review.

Justice Marshall voiced his objection to the Court's approach to equal protection analysis in *San Antonio Independent School District v. Rodriguez*.[95] Recognizing that the Court had applied a stricter rational basis standard in judging equal protection challenges in certain cases, Justice Marshall explained this incoherent employment of heightened scrutiny as the Court's unspoken acknowledgment of the constitutional importance of the interest involved and of the invidiousness upon which the classification was based.[96] To substantiate his theory, Justice Marshall reviewed the cases in which the more stringent standard of rational basis review had been employed and noted that in each case the Court was unwilling to dream up a rational basis for the

---

[94] *See* Schlesinger v. Ballard, 419 U.S. 498, 520 (1975)(Brennan, J., dissenting)(Court has refused to exercise its imagination in order to sustain invalid classification and has chosen to analyze asserted governmental objectives to determine whether they were actual purpose of classification)(citing Johnson v. Robison, 415 U.S. 361 (1974); Eisenstadt v. Baird, 405 U.S. 438 (1972); and James v. Strange, 407 U.S. 128 (1972)). In Flemming v. Nestor, 363 U.S. 603, 612 (1960), the Court stated that for purposes of rational basis review, the actual motive of the legislative enactment was constitutionally irrelevant.

[95] 411 U.S. 1, 98-110 (Marshall, J., dissenting). *See also* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318-21 (1976)(Marshall, J., dissenting)(disagreeing with Court's adherence to rigid two-tier standard of review under equal protection clause and arguing that Court has rejected its deferential approach under rational basis standard in reviewing certain noneconomic legislation).

[96] *Rodriquez*, 411 U.S. at 98-99, 109. Justice Marshall has long advocated an approach to equal protection analysis in which the Court would determine the constitutionality of a classification by looking at the nature of the classification involved, the importance of the denied governmental benefits to the discriminatory class and the state purposes advanced in justification of the classification. *Id.* at 99. *See also* Richardson v. Belcher, 404 U.S. 78, 90 (1971)(Marshall, J., dissenting)(in determining whether classification is violative of fifth or fourteenth amendment, Court should examine "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state [or federal] interests in support of the classification")(quoting Dandridge v. Williams, 397 U.S. 471, 521 (1970)(Marshall, J., dissenting)). Justice Marshall maintains that the Court has strengthened the degree of scrutiny it has employed in reviewing a classification under the equal protection clause when the nexus between an express constitutional right and a nonconstitutional interest has been sufficiently close. *Rodriquez*, 411 U.S. at 102-104. A similar mode of analysis has been invoked by the Court based upon the particular invidious character of the classification, according to Justice Marshall. *Id.* at 104-109.

state classification but rather closely scrutinized the asserted governmental interests with less than the traditional deference of rational basis review.[97] In conclusion, Justice Marshall stated that the failure to articulate the standards of review actually employed in equal protection cases left the Court open to criticism and that open debate of the standards to be invoked was crucial to the rationality and consistency of the judicial process.[98]

The long awaited candid discussion of the meaning of the rational basis test came in 1980 in *United States Railroad Retirement Board v. Fritz*.[99] In that case, Justice Rehnquist, writing for a majority of six justices,[100] acknowledged that the Court had been inconsistent in its formulation and application of the rational basis standard.[101] Citing *Lindsley v. Natural Carbonic Gas Co.* and *Royster Guano Co. v. Virginia* as cases symbolic of the Court's employment of two different standards of rational basis review, Justice Rehnquist expressly adopted the lenient standard of *Lindsley*.[102] Justice Rehnquist adhered to the deferential approach of sustaining a classification if any set of facts reasonably could be conceived to support it[103] and stated that it was constitutionally irrelevant whether the imagined reasonable objective in fact formed the basis of the legislative decision.[104]

Justice Brennan, with whom Justice Marshall joined, vehemently dissented to the Court's pronouncement of the requirements of rational basis review.[105] He viewed the Court's approach under the rational basis standard as the abdication of independent judicial review.[106] Choosing the more stringent *Royster Guano Co.* standard of rational basis review, Justice Brennan stated that the classification

---

[97] *Rodriquez*, 411 U.S. at 103-109. The cases Justice Marshall examined included Eisenstadt v. Baird, 405 U.S. 438 (1972), James v. Strange, 407 U.S. 128 (1972), Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972), and Reed v. Reed, 404 U.S. 71 (1971).

[98] *Rodriquez*, 411 U.S. at 110.

[99] 449 U.S. 166 (1980).

[100] *Id.* at 167. Chief Justice Burger and Justices Stewart, White, Blackmun and Powell joined Justice Rehnquist in the majority opinion. Justice Stevens separately concurred in the judgment. *Id.* at 180-82 (Stevens, J., concurring).

[101] *Id.* at 174.

[102] *Id.* at 174-76. *See supra* text accompanying notes 24-31.

[103] *Fritz*, 449 U.S. at 174, 176. Justice Rehnquist indicated that in recent cases the Court had consistently taken this deferential stance under rational basis review and had refused to strike down classifications which it considered unwise or unartfully drawn. *Id.* at 175 (citing Vance v. Bradley, 440 U.S. 93, 97 (1979); New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Dandridge v. Williams, 397 U.S. 471, 485-86 (1970)).

[104] *Fritz*, 449 U.S. at 179 (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960)).

[105] *Fritz*, 449 U.S. at 182-198 (Brennan, J., dissenting).

[106] *Id.* at 183, 187.

must bear a fair and substantial relation to the purpose of the law to survive equal protection analysis.[107] Rather than upholding a classification on the basis of a fictitious governmental objective, Justice Brennan contended that recent cases demonstrate that the lowest standard of review now required the Court to judge the legitimacy of the classification by determining the reasonableness of the *actual* purpose of the law.[108] The objectives of the law are deduced from the statute itself and legislative history rather than accepting the assertions of government lawyers who argue a "conceivable basis" upon which the classification might be considered reasonable, Justice Brennan argued.[109] Justice Rehnquist responded to Justice Brennan's dissent in a footnote and stated that his contentions concerning the proper application of rational basis review were nothing more than comments in a dissenting opinion.[110]

Three months later, in *Schweiker v. Wilson*,[111] the Court deviated from the highly tolerant standard of rational basis review articulated in *Fritz* and applied a more *biting* type of analysis. The case involved a federal program which denied Supplemental Security Income benefits to a class of otherwise eligible individuals because they were living in a public mental institution which did not receive Medicaid benefits on their behalf.[112] Though it was argued that the challenged statute classi-

---

[107] *Id.* at 184.

[108] *Id.* at 187-88 (emphasis supplied). In complete contradiction of Justice Rehnquist, Justice Brennan stated that equal protection analysis had changed significantly since the days of Flemming v. Nestor and that, in the past 10 years, the Court had examined challenged classifications in relation to the actual purpose of the law. *Id.* (citing Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975); Johnson v. Robison, 415 U.S. 361, 381-82 (1974); and San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 17 (1973)).

[109] *Fritz*, 449 U.S. at 188.

[110] *Id.* at 176 n.10. Justice Stevens, concurring in the result, thought the equal protection clause mandated more than a "conceivable" or "plausible" explanation of the discriminatory treatment but disagreed with Justice Brennan's opinion that all classifications must further the actual purpose of the enactment. *Id.* at 180. Since the actual motive of the legislature is sometimes unknown, Justice Stevens believed that the Court should search for a correlation between the classification and either the actual purpose of the enactment or a rational purpose that the Court could reasonably presume to be the motive behind the legislature's actions. *Id.* at 181.

[111] 450 U.S. 221 (1981).

[112] *Id.* at 222-25. The Supplemental Security Income program was designed to aid individuals who could not work because of age, blindness or disability. From the beginning, the program excluded from eligibility individuals institutionalized in a public hospital or institution but excepted those persons who resided in a public institution which received Medicaid funds on their behalf. *Id.*

fied on the basis of mental illness and should therefore be subjected to heightened scrutiny, the Court avoided the issue by concluding that the statute did not classify on the basis of mental health and held that rational basis review was the appropriate standard to be employed.[113] Five members of the Court, speaking through Justice Blackmun, stated that the rational basis standard was "not a toothless one" and cited *Mathews v. Lucas*, a case in which the Court applied a heightened level of scrutiny to a classification based upon illegitimacy.[114] *Mathews* was also cited by Justice Brennan in his dissent in *Fritz* as an example of the Court's employment of a stricter rational basis standard.[115]

In addition, Justice Blackmun, in upholding the statute, reviewed the legislative history and stated that the decision to exclude from the program those who did not receive Medicaid was a "deliberate and considered choice" by Congress which was motivated by an assumption that the primary responsibility of caring for persons in public mental institutions fell upon the states.[116] Just three months earlier, the Court had said that the legislature's true reasons for an enactment were "constitutionally irrelevant."[117] Thus, the Court strayed from the ra-

---

[113] *Id.* at 226-27, 230-34. The district court invoked the intermediate standard of review on the basis that mental health classifications possessed many of the characteristics of a suspect class. Sterling v. Harris, 478 F. Supp. 1046, 1052-53 (N.D. Ill. 1979). The court stated that the mentally ill were a politically powerless minority that had been subjected to a history of discriminatory treatment. *Id.* at 1052. The Supreme Court disagreed with the district court's holding that Congress had classified on the basis of mental health and held that Congress had only distinguished between individuals in public institutions receiving Medicaid benefits for their care and individuals in those institutions receiving no Medicaid benefits. *Schweiker*, 450 U.S. at 232-33.

[114] *Schweiker*, 450 U.S. at 234. *See supra* note 60.

[115] *Fritz*, 449 U.S. at 184 (Brennan, J., dissenting).

[116] *Schweiker*, 450 U.S. at 235-37. The Court greatly relied upon the assertions of the government's attorneys that the exclusion of residents of public institutions not receiving medicaid benefits was rationally related to Congress' intent to limit federal expenditures to those individuals already receiving federal assistance through Medicaid coverage since the care and treatment of individuals in public institutions was the primary responsibility of the state. *Id.* at 237.

The Court's reliance on arguments advanced by government attorneys resembles the model of equal protection analysis developed by Professor Gunther, one of the first commentators to recognize that the Court was applying a stricter level of rational basis review to economic and social welfare legislation. *See* Gunther, *supra* note 10, at 18-24. Professor Gunther sketched a model that would have the Court judge the legitimacy of a classification by examining legislative purposes that have a substantial basis in fact rather than mere conjecture. *Id.* at 21. In addition, the Court would measure the reasonableness of questionable means on the basis of evidence presented to the Court. *Id.*

[117] *Fritz*, 449 U.S. at 179 (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960)). *See supra* text accompanying note 104.

tional basis position it had taken in *Fritz*.

The voting pattern of the individual justices in these two cases creates the most confusion. In *Fritz*, Chief Justice Burger and Justices Blackmun, Powell, White, and Stewart joined Justice Rehnquist in his pronouncement of a highly deferential rational basis standard.[118] Within a very short time, the same justices, except Justice Powell who dissented, formed the majority opinion of *Schweiker* in which the Court indicated a more stringent level of rational basis review was being applied. Justice Stevens separately concurred in *Fritz*, but in *Schweiker* he joined Justices Marshall and Brennan in a dissent authored by Justice Powell.[119] Unlike the majority, Justice Powell found no evidence in the legislative history of Congress' motive in excluding the disadvantaged class from the federal program and argued that when Congress does not articulate its purpose, the Court should require a fair and substantial relation to the asserted purpose.[120] Justice Powell utilized a footnote to cast doubt on the present value of *Flemming v. Nestor* and *McGowan v. Maryland* by stating that these decisions did not describe the importance of actual purpose in the Court's analysis which he considered "an essential step in equal protection."[121] In *Fritz*, Justice Powell expressly rejected this line of reasoning for rational basis review.

Schweiker and *Fritz* exemplify the Court's inconsistent and bewildering approach to rational basis review under the equal protection clause. As noted by Justice Powell in *Schweiker*, the justices have failed to reach a consensus "on the clarity with which a legislative purpose must appear and about the degree of deference afforded the legislature in suiting means to ends."[122]

City of Cleburne, Texas v. Cleburne Living Center

In July, 1980, Jan Hannah purchased a house in Cleburne, Texas, for the purpose of leasing it to Cleburne Living Center, Inc. (CLC) for the establishment of a group home for thirteen mildly or moderately retarded men and women who would be constantly supervised by CLC

---

[118] *See supra* note 100.

[119] *Schweiker*, 450 U.S. at 239-47 (Powell, Brennan, Marshall, and Stevens, JJ., dissenting).

[120] *Id.* at 242, 244-45.

[121] *Id.* at 244 n.6.

[122] *Id.* at 243 n.4 (comparing Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911), with Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

staff members.[123] Since the house was located in a district zoned R-3, Cleburne's zoning ordinance required CLC to obtain a special use permit, renewable annually, from the Cleburne City Council before it could use the house as a group home.[124] After the Cleburne Planning and Zoning Commission denied Hannah's application for a special use permit, the Cleburne City Council held a public hearing on the matter and also voted to refuse the permit.[125]

Following the exhaustion of administrative remedies, Hannah and CLC sued the City of Cleburne, individual city employees, and council members for injunctive relief and damages.[126] CLC attacked the zoning ordinance on the grounds that it violated the equal protection rights of

---

[123] Cleburne Living Center, Inc. v. City of Cleburne, Texas, 726 F.2d 191, 193 (5th Cir. 1984). Jan Hannah is the Vice President and co-owner of CLC, a Texas corporation which establishes and operates group homes for the mentally ill.

[124] *Id.* at 194. Cleburne's zoning ordinance lists the permitted uses in an R-3 district:

1) Any use permitted in District R-2.
2) Apartment houses, or multiple dwellings.
3) Boarding and lodging houses.
4) Fraternity or sorority houses and dormitories.
5) Apartment hotels.
6) Hospitals, sanitariums, nursing homes or homes for convalescents or aged, other than for the insane or feeble-minded or alcoholics or drug addicts.
7) Private clubs or fraternal orders, except those where chief activity is carried on as a business.
8) Philanthropic or eleemosynary institutions, other than penal institutions.
9) Accessory uses customarily incident to any of the above uses.

Id. at 193-94. *See supra* note 5.

[125] *Cleburne Living Center*, 726 F.2d at 194. In denying the special use permit, the city council considered the following factors:

1) the attitude of a majority of owners located within 200 feet of the house;
2) the location of a junior high school across the street from the house;
3) concern for the fears of elderly residents of the neighborhood;
4) the size of the home and the number of people who would live in it;
5) concern over the legal obligations of CLC for any actions which the mentally retarded residents might take;
6) the home's location on a 500 year flood plain; and
7) in general, the presentation made before the city council.

Id.

[126] *Id.* Advocacy, Inc., a non-profit corporation organized to provide legal services to developmentally disabled individuals, and the Johnson County Association for Retarded Citizens (JCARC) joined the plaintiffs in this suit. *Id.* Both the district court and the court of appeals held that JCARC lacked standing to litigate the suit on the basis that JCARC had failed to prove any injury to itself or to its members. *Id.* at 203. For convenience, Hannah and CLC will be referred to as "CLC."

CLC and its potential residents both on its face and as applied.[127] Finding that mental retardation was neither a suspect nor a quasi-suspect classification, the district court applied the rational basis test and held that the ordinance was rationally related to the city's proper interests in the legal obligations of CLC and its residents, the safety and fears of the neighbors, and the number of people who would be living in the house.[128]

The Court of Appeals for the Fifth Circuit reversed, concluding that classifications based on mental retardation were quasi-suspect and warranted the application of the intermediate standard of review.[129] Though the mentally retarded were not accorded suspect status on the basis that mental retardation was a relevant distinction in many instances, the court thought mentally retarded persons shared sufficient characteristics of a suspect class to justify heightened scrutiny.[130] Considering the cruel and unfair treatment to which the mentally retarded had been subjected throughout history, the Fifth Circuit reasoned that discrimination against this class was "likely to reflect deep-seated prejudice."[131] In addition, the mentally retarded have been insulated from the political process, and suffer an immutable condition.[132] The court deemed heightened scrutiny to be especially appropriate in this case because the zoning ordinance denied a benefit which, though not fundamental, was very important to the mentally retarded.[133] The

---

[127] City of Cleburne, Texas v. Cleburne Living Center, 53 U.S.L.W. 5022, 5023. CLC also alleged that the ordinance violated the due process clause as the distinctions drawn in the statute were arbitrary, capricious, and unconstitutionally vague. *Cleburne Living Center, Inc.*, 726 F.2d at 194 n.4. In addition, CLC argued that the ordinance and the city council's denial of the special use permit violated the Revenue Sharing Act. *Id.* at 194. This act prohibits the discrimination of an "otherwise qualified handicapped individual" in a program that is federally funded. 31 U.S.C.A. § 6716(b)(2) (1983).

[128] *Cleburne Living Center*, 53 U.S.L.W. at 5023. The district court also denied CLC's other claims. *Id.* at n.5.

[129] *Cleburne Living Center*, 726 F.2d at 198.

[130] *Id.* at 197-98.

[131] *Id.* at 197. For an insightful discussion concerning the history of unequal treatment of mentally handicapped persons, see Burgdorf, *A History of Unequal Treatment: The Qualifications Of Handicapped Persons As A "Suspect Class" Under The Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 861-99 (1975).

[132] *Cleburne Living Center*, 726 F.2d at 197-98. *But cf.* J. Ely, DEMOCRACY AND DISTRUST 150 (1980)(discussion of whether immutability should be considered classifying trait of suspect class).

[133] *Cleburne Living Center*, 726 F.2d at 199. The court relied upon Plyler v. Doe, 457 U.S. 202, 220-24 (1982), in which the Supreme Court held that intermediate review was the applicable standard of review because the children of illegal aliens possessed enough of the characteristics of a suspect class and because they were denied the impor-

court stated that the exclusion of group homes in Cleburne prevented the mentally retarded from ever becoming a vital part of society.[134] Employing the intermediate level of review, the court invalidated the ordinance both on its face and as applied because it was not substantially related to any important governmental interests.[135]

After the Fifth Circuit denied rehearing en banc,[136] the Supreme Court granted certiorari.[137] In an opinion authored by Justice White, in which Chief Justice Burger and Justices Rehnquist, Powell, Stevens, and O'Connor joined, the Court rejected the Fifth Circuit's holding that mental retardation was a quasi-suspect classification triggering the intermediate level of review.[138] Rather, the Court determined that classifications based on mental retardation should be subjected to minimal scrutiny under the rational basis standard.[139]

The Court then turned to the issue of whether the city could rationally require a special use permit for the operation of this particular

---

tant benefit of an education. *Cleburne Living Center*, 726 F.2d at 199.

[134] *Cleburne Living Center*, 726 F.2d at 199. The district court found that

> [g]roup homes currently are the principal community living alternatives for persons who are mentally retarded. The availability of such a home in a community is an essential ingredient of normal living patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community.

Id.

[135] *Id.* at 200. The court assumed the substantiality of all the asserted objectives but ruled that there was not a sufficiently close fit between the objectives and the ordinance's means of attaining them. *Id.*

[136] Cleburne Living Center, Inc. v. City of Cleburne, Texas, 735 F.2d 832, 832 (1984).

[137] *Cleburne Living Center*, 53 U.S.L.W. 3365 (1984).

[138] 53 U.S.L.W. at 5024. The Court emphasized that the state has a legitimate interest in regulating the mentally retarded because they have a reduced ability to function in the world and they represent a large an diversified class. The Court reasoned that the judiciary was not sufficiently informed to independently judge legislative decisions, based upon professional advice, dealing with mentally retarded persons. *Id.*

The Court found further support for its refusal to apply heightened scrutiny in the federal and state legislation protecting the mentally retarded. The Court stated that this legislative response "belies a continuing antipathy or prejudice" toward the mentally retarded. *Id.* In addition, the Court viewed the legislative action as evidence that the mentally retarded were not politically powerless. *Id.* at 5024-25. Employing heightened scrutiny to classifications based on mental retardation risked the legislatures' responding by ceasing to enact protective legislation for the mentally retarded, argued the Court. *Id.*

Finally, the Court objected to classifying the mentally retarded as quasi-suspect because of the difficulty it foresaw in distinguishing between various groups who may possess some qualities of a suspect class. *Id.*

[139] *Id.*

group home when no permit was required for other care and multiple dwelling facilities.[140] Engaging in an analysis that defied the articulated standard of review, the Court closely scrutinized the justifications offered in support of the city council's denial of the special permit. The Court considered the city council's concern with the negative attitude of the nearby property owners and the fears of elderly neighbors to be impermissible reasons for the discriminatory treatment of the mentally retarded.[141] The city council's fear that students of a closely located junior high school might torment the mentally retarded residents was also rejected by the Court.[142] The Court reasoned that the school itself was attended by thirty mentally retarded students and that refusing a permit on the basis of such fears allowed a segment of the community to dictate an action that was in violation of the equal protection clause.[143] Dismissing the council's objection to the home's location on a 500-year flood plain as an irrational distinction, the Court pointed out the fact that other facilities could be located on the same site without obtaining a special use permit.[144] An additional concern of the city council was the size of the home and the number of people who would live in it. Noting that the lower courts found that the home's use would be permitted under the zoning ordinance if the potential occupants of the home were not mentally retarded, the Court searched the record for a reasonable justification for the denial of the permit solely because the intended residents were mentally retarded and found no legitimate reason.[145]

Upon completion of this rigorous examination, the Court stated that the record failed to reveal any reasonable basis for the discriminatory treatment of the mentally retarded in this case and concluded

---

[140] *Id.* at 5025-26.

[141] *Id.* at 5026.

[142] *Id.*

[143] *Id.*

[144] *Id.* In discussing the council's concern about the legal responsibility for any actions possibly taken by the mentally retarded residents, the Court expressed disbelief that the mentally retarded presented any risks different from those that accompany other uses permitted in the district. *Id.*

[145] *Id.* The Court also rejected the arguments made by the city in the lower courts. The city's objectives of avoiding the concentration of population and reducing congestion of the streets failed as reasonable explanations for the requirement of a permit for the operation of the CLC group home when other facilities could locate in the district without a permit. In addition, the Court found the city's apprehension about fire hazards, the serenity of the neighborhood and the avoidance of harm to other residents equally unpersuasive as rational justifications for the discriminatory treatment of the mentally retarded individuals. *Id.*

that the requirement of a permit was based upon "an irrational prejudice against the mentally retarded."[146] The Court, therefore, invalidated the ordinance as applied to the CLC group home.[147]

In a concurring opinion, joined by Chief Justice Burger, Justice Stevens criticized the employment of the three standards of review in equal protection analysis.[148] He thought that the standards failed to adequately explain the process by which the judiciary reached a decision. Instead, Justice Stevens viewed the three-tiered analysis as a technique the Court utilized to explain decisions while it actually applied the single standard of rational basis review.[149] He, therefore, agreed with the Court's employment of rational basis review to classifications based on mental retardation and joined its decision to invalidate the ordinance as applied.[150]

In a separate opinion, Justice Marshall, joined by Justices Brennan and Blackmun, criticized the Court for its superficial adherence to rational basis review while it engaged in a more intensified analysis.[151] Justice Marshall stated that under the traditional rational basis test, the zoning ordinance would have survived the Court's deferential review.[152] Instead, the Court held the ordinance invalid only after it had engaged in a searching inquiry that is characteristic of heightened judicial review, Justice Marshall asserted.[153]

Comparing the Court's analysis with the requirements of the rational basis standard, Justice Marshall stated that unlike the Court's procedure in this case, the rational basis test does not require the Court to examine the record to find a reasonable basis for the challenged classification.[154] In response to the Court's disbelief that the

---

[146] *Id.*

[147] *Id.*

[148] *Id.* at 5026-27 (Stevens, J., concurring).

[149] *Id.*

[150] *Id.* at 5028.

[151] *Id.* (Marshall, J., concurring in part and dissenting in part). The legal community has also expressed the opinion that the Court applied a more stringent level of review than the highly deferential rational basis standard. *See, e.g.*, 54 U.S.L.W. 2202 (October 15, 1985)(Professor Tribe stated that Court had applied something considerably more than minimal rational basis review); Stewart, *A Growing Equal Protection Clause?*, A.B.A.J. 112, 114 (October 1985)(discussion of law professors' views that Court applied heightened scrutiny under rational basis test in *Cleburne Living Center*).

[152] *Cleburne Living Center*, 53 U.S.L.W. at 5028.

[153] *Id.*

[154] *Id.* Justice Marshall found another inconsistency with rational basis review in the Court's conclusion that the city council's concerns for fire hazards and the serenity of the neighborhood did not warrant placing these burdens solely on the mentally retarded. Under the most deferential version of rational basis review, Justice Marshall declared,

mentally retarded presented added risks unlike other groups, Justice Marshall said that the legislature is not burdened with the task of convincing the Court that the lines it has drawn are reasonable.[155] Rather, legislatures are presumed to have acted constitutionally under the rational basis standard.[156]

In further support of his assertion that the Court had applied heightened scrutiny to the zoning ordinance, Justice Marshall referred to the Court's citation of *Zobel v. Williams*[157] and *United States Department of Agriculture v. Moreno*[158] in its discussion of rational basis review.[159] Though the Court had articulated the rational basis test as the applicable standard of review, Justice Marshall depicted these cases as "intermediate review decisions masquerading in rational basis language."[160]

Justice Marshall agreed with the Court's objection to the zoning ordinance on the basis that it was overinclusive.[161] But he believed the ordinance only could be invalidated for its overly broad classifications through the employment of heightened scrutiny since the Court had upheld similar ordinances on rational basis grounds in other equal protection cases.[162]

Finally, Justice Marshall reiterated his belief that the appropriate standard of review applicable in an equal protection case depended upon the constitutional and societal importance of the withheld benefit and the particular invidiousness upon which the classification was based.[163] Relying upon these two considerations, Justice Marshall determined that the intermediate level of review was the proper standard

---

"reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Id.* (quoting Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955)); *see also* New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619, 622 (1973)(Rehnquist, J., dissenting)(stating that in area of economic and social welfare equal protection clause does not forbid states from addressing problems in piecemeal fashion).

[155] *Cleburne Living Center*, 53 U.S.L.W. at 5029.

[156] *Id.* (citing New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 527 (1959); Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 68-70 (1913)).

[157] 457 U.S. 55 (1982). *See supra* notes 88-92 and accompanying text.

[158] 413 U.S. 528 (1973). *See supra* notes 74-81 and accompanying text.

[159] *Cleburne Living Center*, 53 U.S.L.W. at 5029 n.4.

[160] *Id.*

[161] *Id.*

[162] *Id.* (citing New Orleans v. Dukes, 427 U.S. 297, 304-06 (1976); Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955)).

[163] *Cleburne Living Center*, 53 U.S.L.W. at 5029. *See supra* note 96.

to be employed in this case.[164] Applying this heightened scrutiny to the zoning ordinance, Justice Marshall concluded that it was invalid both facially and as applied.[165] He, therefore, would have affirmed the Fifth Circuit's judgment in its entirety.[166]

Cleburne Living Center is the most recent demonstration of the Court's less than clever attempt to disguise the employment of heightened judicial review by purporting to apply the rational basis standard. The Court's intensified analysis and its invalidation of the ordinance as applied reveals that something more powerful than rational basis review was invoked by the Court. In its search of a legitimate justification for the city council's denial of the special use permit to CLC and its potential residents, the Court only considered the evidence in the record.[167] In defiance of traditional rational basis review, the Court refused to hypothesize a rational basis for the discriminatory treatment of the mentally retarded.

Further evidence of the Court's employment of heightened scrutiny to the Cleburne zoning ordinance may be found in other zoning cases. Since *Euclid v. Ambler Realty Co.*,[168] the Court has upheld zoning ordinances as reasonable exercises of the state's police power with only a few exceptions.[169] In *Euclid*, the Court stated that a zoning ordi-

---

[164] *Cleburne Living Center*, 53 U.S.L.W. at 5029. Justice Marshall considered the establishment of a group home an important interest of the mentally retarded. He stated that the right to "establish a home" traditionally has been a treasured fundamental liberty of the due process clause. *Id.* The significance of this interest and the horrendous treatment of the mentally retarded in the past convinced Justice Marshall that the equal protection clause demanded a more stringent review than rational basis review. *Id.* at 5030, 5032.

[165] *Id.* at 5032-34. Justice Marshall strongly dissented to the Court's decision merely to invalidate the ordinance as applied to CLC and its potential residents. *Id.* at 5032. The more just approach, Justice Marshall believed, was to require the city to enact a new ordinance precisely tailored to exclude a particular subclass of retarded individuals in situations in which the exclusion was rationally related to legitimate city objectives. *Id.* at 5033. Justice Marshall stressed that by permitting the broad exclusion of the "feebleminded" to remain intact within the ordinance, the Court left the city council and mentally retarded applicants without sufficient guidelines to determine the constitutionality of future applications of the ordinance. *Id.*

[166] *Id.* at 5034.

[167] *See supra* text accompanying notes 146 and 154.

[168] 272 U.S. 365 (1926). The *Euclid* ordinance regulated and restricted the location of trades, industries, apartment houses, two-family houses, single-family houses and other land uses. In addition, the ordinance regulated lot sizes and the size and height of buildings. *Id.* at 379-80. The Court upheld the ordinance against an equal protection and due process attack on the basis that the law was not arbitrary. *Id.* at 389.

[169] *See* J. NOWAK, R. ROTUNDA, J. YOUNG, *Constitutional Law* 485 (1983)(since *Euclid*, Court has deferred to state zoning power against equal protection and due process

nance would not be declared unconstitutional unless the provisions were "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."[170] It is clear that under this test the Cleburne zoning ordinance would have survived the Court's inquiry. Yet the Cleburne ordinance was invalidated as applied in this case in spite of *Euclid* and its progeny.

The composition of justices in the majority opinion and the dis-

---

challenges with exceptions in early cases). *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255, 257, 259 (1980)(upholding zoning ordinance which restricted owner's use of five-acre tract of land to building no more than five single-family residences); Goldblatt v. Hempstead, 369 U.S. 590, 592, 596 (1962)(sustaining zoning ordinance which prohibited any excavation below water-line within city limits). *But see* Metromedia, Inc. v. San Diego, 453 U.S. 490, 521 (1981)(invalidating zoning ordinance which prohibited certain noncommercial billboards but permitted certain onsite commercial billboards as violation of first amendment); Nectow v. Cambridge, 277 U.S. 183, 188-89 (1927)(striking down zoning ordinance because it arbitrarily classified property owner's land).

[170] *Euclid*, 272 U.S. at 395. In Shelton v. City of College Station, No. 83-2765 (5th Cir. filed Jan. 6, 1986)(en banc), the Fifth Circuit affirmed a district court's granting of summary judgment for zoning officials and the City of College Station in an action brought by two businessmen who claimed their substantive due process rights had been violated by the city and the zoning officials. *Id.* at 2023, 2025. Specifically, the zoning board had denied a variance to the businessmen who had planned to open a pool hall in a building that was subject to a zoning ordinance requiring a certain number of off-street parking places for various types of businesses. *Id.* at 2024.

In considering the constitutionality of the zoning decision, the court stated that a regulatory decision can be either legislative or adjudicative and that judicial review of the decision will vary accordingly. *Id.* at 2027. Under the adjudicative model, the court stated, historical facts are determined by judge or jury and must be accepted unless the evidence in the record does not support the facts. In contrast, the legislative model requires persons challenging the legislative judgment to convince the court that the facts upon which the classification is grounded "could not reasonably be conceived to be true by the governmental decisionmaker." *Id.* (quoting Vance v. Bradley, 440 U.S. 93, 110-11 (1979)). Relying upon *Euclid v. Ambler Realty Co.*, the court determined that zoning decisions were quasi-legislative and would not be declared unconstitutional unless "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 2028. The "key inquiry," the court stated, is whether the factual question is "at least debatable." *Id.* at 2033, 2036. Concluding that the zoning board's determination that the plaintiffs' proposed business would thwart the city's legitimate objective of controlling parking and traffic congestion was "at least debatable," the Fifth Circuit held that the businessmen's substantive due process rights had not been denied. *Id.* at 2035, 2037-38.

The Fifth Circuit acknowledged that last term the Supreme Court invalidated three legislative decisions through the employment of rational basis review in *Cleburne Living Center* and in two other decisions, but stated that in these decisions the Court had not suggested that legislative purpose could not be hypothesized. *Id.* at 3034-35. Rather, the Fifth Circuit stated, the Court searched for a conceivable rational basis to justify the decision made by the legislative body. *Id.* at 2035.

senting-in-part opinion of *Cleburne Living Center* is as surprising as the Court's analysis. In *United States Railroad Retirement Board v. Fritz*,[171] Chief Justice Burger and Justices White, Powell, Blackmun, and Stewart (now replaced by Justice O'Connor), joined Justice Rehnquist in his adoption of the most lenient standard of rational basis review.[172] Justices Brennan and Marshall strongly dissented to the Court's deferential formulation and contended that the rational basis test had developed into a more stringent standard of review requiring that the challenged classification be substantially related to an important governmental interest.[173]

In *Cleburne Living Center*, the justices have changed positions. Chief Justice Burger and Justices Rehnquist, White, Powell and O'Connor applied a stringent rational basis test that is hardly reminiscent of the deferential standard adopted in *Fritz*.[174] In contrast, Justices Marshall, Brennan, and Blackmun objected to the Court's employment of heightened scrutiny under the rational basis standard on the basis that the rational basis test is a very lenient standard of review.[175] Justice Blackmun was consistent in his opinion in both *Fritz* and *Cleburne Living Center*, but in *Schweiker v. Wilson* he indicated that the rational basis test was a standard "with teeth."[176] Finally, Justice Stevens filed a separate opinion in *Cleburne Living Center* in which he espoused his belief in only one standard of review, the rational basis standard.[177] Yet, in *Schweiker*, Justice Stevens joined Justices Powell, Brennan, and Marshall in an opinion wherein Justice Powell stated that when the government does not articulate its objective for a challenged classification, the legislation must be substantially related to an important governmental interest.[178] Justice O'Connor has yet to show any signs of such erratic behavior with the requirements of rational basis review but this may be attributable to her relatively recent appointment to the Court.

Cleburne Living Center reflects two possible avenues the Court may take in future equal protection cases. First, the Court's refusal to accord the mentally retarded quasi-suspect status signals that the Court will not expand the number of favored classes beyond those pre-

---

[171] 449 U.S. 166 (1980).
[172] *See supra* text accompanying notes 99-104.
[173] *See supra* text accompanying notes 105-109.
[174] *See supra* text accompanying notes 141-47.
[175] *See supra* text accompanying notes 151-62.
[176] *See supra* text accompanying notes 114 and 115.
[177] *See supra* text accompanying notes 148-50.
[178] *See supra* text accompanying notes 119 and 120.

viously recognized. Rather, the Court will continue to apply heightened scrutiny under the guise of rational basis review to classes deserving quasi-suspect status.[179] The Court's second avenue retraces familiar steps. In analyzing future challenged classifications based on mental retardation, the Court may follow a pattern similar to its approach to gender and illegitimacy classifications. With these classifications, the Court initially purported to apply the rational basis standard while it actually invoked a heightened level of review. After several decisions, the Court finally recognized gender classifications and illegitimacy classifications as quasi-suspect and expressly employed the intermediate level of review.[180]

Conclusion

The repercussions of the Court's contradictory approach to rational basis review are severe and far-reaching. The bar now faces a real dilemma when its members must decide whether to file a lawsuit or appeal a case based upon the chances of winning under rational basis review. Also, without adequate guidelines as to the proper intensity of review required under the rational basis test, lower courts will be rendering conflicting decisions in cases involving similar fact situations. More important than the inconsistency among the lower courts will be the injustice practiced upon some injured parties as a result of these decisions. The failure of the justices to reach a consensus on the required degree of scrutiny and the clarity with which a purpose must appear is an abdication of the Court's responsibility to provide guidance. For these reasons, it is crucial that the Court develop a coherent approach to rational basis review under the equal protection clause.

Ann H. Denney

---

[179] *Cf.* Stewart, *A Growing Equal Protection Clause?*, A.B.A.J. 112 (October 1985)(reporting interview with Herman Schwartz, American University law professor who assisted with CLC's brief, in which Schwartz stated that basis for Court's opinion was that it did not want to recognize another quasi-suspect class but it refused to permit discrimination against mentally retarded).

[180] *See supra* notes 59 and 60 and accompanying text.

RECENT DECISIONS

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT GUARANTEES THE EFFECTIVE ASSISTANCE OF COUNSEL ON A FIRST APPEAL AS A MATTER OF RIGHT

Defendant,[1] convicted of a criminal offense,[2] sought appellate review in the court of appeals of Kentucky.[3] Defendant's retained counsel[4] failed to file a statement of appeal in accordance with the Kentucky rules of appellate procedure,[5] thereby resulting in the dismissal of defendant's appeal.[6] Defendant's request for discretionary appellate review was denied by the Kentucky Supreme Court.[7] Defendant then applied for federal habeas corpus relief,[8] alleging that he had received

---

[1] Defendant was Keith E. Lucey. Evitts v. Lucey, 105 S. Ct. 830, 830 (1985).

[2] *Id.* at 832. Defendant was convicted of trafficking in controlled substances in a Kentucky state court on March 21, 1976. *Id.*

[3] *Id.* The Kentucky Constitution provided for one appeal as a matter of right in all cases. *Id.* at 839; *see* KY. CONST. § 115 (appellate policy and procedure).

[4] Defendant's counsel at trial and on appeal had been retained by the defendant rather than appointed by the state. *Id.*

[5] *Id.* The Kentucky rules of appellate procedure require appellants to file a record on appeal and a statement of appeal in all cases. KY. R. APP. P. 1.095(A)(1). The statement of appeal is to include the names of the appellants, appellees, counsel, and trial judge; the date of the judgment appealed; the filing date of the notice of appeal; and additional facts if necessary. *Id.* at 1.090. Defendant's counsel filed the appellate brief and record on appeal but did not file a statement of appeal. *Evitts*, 105 S. Ct. at 832.

[6] *Evitts*, 105 S. Ct. at 832. The court of appeals granted the state's motion to dismiss for failure to file the statement of appeal on the ground that defendant had failed to comply with state appellate procedure. Defendant's counsel claimed that the information required in the statement of appeal was included in the appellate brief and unsuccessfully moved for reconsideration. Defendant then presented to the court of appeals a statement of appeal that formally complied with the Kentucky rules of appellate procedure. *Id.*

[7] *Id.* at 833. In refusing to grant discretionary appellate review, the Kentucky Supreme Court, in a one-sentence order, affirmed the lower court's holding. *Id.* The trial court then denied a motion by defendant to vacate the judgment or grant a belated appeal. *Id.*

[8] *Id.* A convicted criminal defendant may apply for a writ of habeas corpus only on

ineffective assistance of counsel on appeal in violation of the fourteenth amendment due process clause.[9] The United States District Court for the Eastern District of Kentucky granted a conditional writ of habeas corpus ordering defendant's release unless the state either retried him or reinstated his appeal.[10] On appeal to the United States Court of Appeals for the Sixth Circuit, the case was remanded to the district court for a determination of whether defendant had a claim under both the equal protection and due process clauses of the fourteenth amendment.[11] On remand the inquiry was limited to a violation of the due process clause.[12] The district court reissued the conditional writ and the court of appeals affirmed.[13] On writ of certiorari, the United States Supreme Court, *held*, affirmed. Under the due process clause of the fourteenth amendment, a criminal defendant is guaranteed the effective assistance of counsel on his first appeal as of right. *Evitts v. Lucey*, 105 S. Ct. 830 (1985).

The right to counsel is found in the sixth amendment to the United States Constitution.[14] Although the sixth amendment established the constitutional mandate of the right to assistance of counsel, the amendment did not expressly compel states to afford counsel in criminal prosecutions.[15] Therefore, the determination of the scope and

---

the ground that his imprisonment constitutes a violation of the United States Constitution, laws, or treaties. 28 U.S.C. § 2254 (1982). If the applicant has exhausted all remedies in the state courts, if a state corrective process is unavailable, or if the applicant's rights are ineffectively protected under a state corrective process, the writ of habeas corpus is granted. *Id.* at § 2254(b).

[9] *Evitts*, 105 S. Ct. at 833. The fourteenth amendment provides in pertinent part that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

[10] *Evitts*, 105 S. Ct. at 833. The district court concluded that the failure by defendant's counsel to comply with the state appellate procedure constituted ineffective assistance of counsel on appeal. *Id.*

[11] *Id.* Defendant sought federal habeas corpus relief only on the ground of a due process violation. *Id.* The court of appeals did not render a decision on the merits of the appeal but remanded the case to the district court to determine if an equal protection issue was present. *Id.*

[12] *Id.* Both the state and the defendant entered the stipulation that no equal protection claim existed; the only question to be answered was whether a due process violation had occurred. *Id.*

[13] *Id.*

[14] U.S. CONST. amend. VI. The sixth amendment, in pertinent part, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." *Id; see* Powell v. Alabama, 287 U.S. 45, 60-65 (1932)(historical development of right to counsel). *See generally* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 24 (1955)(discussing right to counsel at common law).

[15] J. BOSTON, R. HERMAN & E. SINGLE, COUNSEL FOR THE POOR 11 (1977). *See gener-*

nature of the federal right required judicial interpretation.[16] In *Powell v. Alabama*,[17] the United States Supreme Court began the process of defining the right to counsel.[18] *Powell* involved seven indigent black minors who were charged with the capital offense of rape.[19] No lawyer was appointed to represent the defendants until the morning of the trial.[20] Subsequently, the defendants were convicted and sentenced to death.[21] In reversing the convictions, the Supreme Court held that the defendants had been deprived of the right to appointed counsel in violation of the due process clause of the fourteenth amendment.[22]

The *Powell* Court noted that although the sixth amendment granted the right to assistance of counsel for criminal defendants only

---

ally Wanat, *Conflicts of Interest in Criminal Cases and the Right to Effective Assistance of Counsel - The Need for Change*, 10 RUT.-CAM. 57, 58-59 (1978)(interpretation of right to counsel by states).

[16] W. BEANEY, *supra* note 14, at 24. Professor Beaney concluded that the intent of the drafters could not be determined from the available history of the sixth amendment. *Id.* At the time the sixth amendment was drafted, it was generally understood that jurisdiction over a significant number of criminal prosecutions would not be vested in federal courts. *Id.* at 25. Therefore, the intended scope of the federal right to counsel was given little consideration by the drafters of the amendment. *Id.* Only through judicial determination could the sixth amendment doctrine of the right to counsel be defined. *Id.*; *see also*, Steele, *The Doctrine of Right to Counsel: Its Impact on the Administration of Criminal Justice and the Legal Profession*, 23 SW. L.J. 489, 489-90 (1969)(judicial interpretation of sixth amendment right to counsel); Wanat, *supra* note 15, at 58 (same).

[17] 287 U.S. 45 (1932).

[18] R. MCNAMARA, CONSTITUTIONAL LIMITATIONS ON CRIMINAL PROCEDURE 215 (1982). *See generally* Craig, *The Right to Adequate Representation in the Criminal Process: Some Observations*, 22 SW. L.J. 260, 262-63 (1968)(discussing evolution of right to counsel); Herman & Thompson, Scott v. Illinois *and the Right to Counsel: A Decision in Search of a Doctrine?*, 17 AM. CRIM. L. REV. 71, 72 (1979)(same).

[19] *Powell*, 287 U.S. at 49.

[20] *Id.* at 56. Alabama state law provided for the appointment of counsel for indigent defendants charged with a capital offense. *Id.* at 48. Six days before trial, the trial judge designated all of the members of the county bar to represent the defendants at arraignment. *Id.* at 49. The trial court assumed that the members of the bar would continue to assist the defendants at trial if no one attorney appeared. *Id.* No counsel came forward and the morning of the trial the court designated an out-of-state attorney to represent the seven defendants. *Id.* at 56.

[21] *Id.* at 50.

[22] *Id.* at 71. On writ of certiorari to the United States Supreme Court, the defendants alleged that the actions of the trial court constituted a denial of the right to counsel in violation of the due process and equal protection clauses of the fourteenth amendment. *Id.* at 50. The Supreme Court limited its inquiry to whether there had been a violation of the due process clause and concluded that both the collective appointment of counsel and the trial court's failure to allow the defendants reasonable time for consultation with counsel unconstitutionally deprived the defendants of due process of law. *Id.* at 71.

in federal courts,[23] the due process clause of the fourteenth amendment extended protection of this right to counsel in state courts.[24] The Court stated that a defendant who was unable to employ counsel and incapable of presenting an adequate defense had to be provided with court-appointed counsel in order to ensure a fair criminal proceeding.[25] The Court further reasoned that in accordance with the due process clause of the fourteenth amendment, appointed counsel must render effective assistance in both the preparation and the trial of the case.[26] Under the *Powell* decision, states were compelled to provide appointed counsel at trial[27] to indigent capital defendants.[28]

The sixth amendment federal right to counsel was extended to all federal criminal proceedings, capital and noncapital, in *Johnson v. Zerbst*.[29] The indigent defendant in *Johnson* had been tried and convicted of a noncapital felony offense[30] without the assistance of court-appointed counsel.[31] The Supreme Court held that a criminal defendant in federal court could not be deprived of his life or liberty unless

---

[23] *Id.* at 66.

[24] *Id.* at 67. The Court noted that the first eight amendments contained rights that were fundamental to the principles of liberty and justice. *Id.* The Court reasoned that a violation of those federal rights protected by the first eight amendments would also be a violation of due process of law protected by the fourteenth amendment. *Id.*; *see also* Twining v. New Jersey, 211 U.S. 78, 99-100 (1908)(rights encompassed in first eight amendments fundamental to due process of law are safeguarded by fourteenth amendment). The due process clause, therefore, embraces those fundamental rights even though the rights are specifically provided by other portions of the Constitution. *Powell*, 287 U.S. at 67. The Court concluded that the right to counsel was a fundamental right worthy of protection against both federal and state action. *Id.*

[25] *Powell*, 287 U.S. at 71. The Court reasoned that the average layman, without the assistance of counsel, would lack the knowledge to defend himself and would therefore be unable to establish his innocence. *Id.* at 69.

[26] *Id.* at 71. *See generally* Craig, *supra* note 18, at 264 (analyzing quality of representation under *Powell*).

[27] *Powell*, 287 U.S. at 73. The right to counsel created by the sixth amendment was made binding on the states through the fourteenth amendment due process clause. *Id.* at 71.

[28] *Id.* The Court expressly stated that the holding was limited to capital cases. *Id.*; *see, e.g.*, Wilson v. Lanagan, 99 F.2d 544, 546 (1st Cir. 1938)(refusing to provide appointed counsel in noncapital case), *cert. denied*, 306 U.S. 634 (1939). *See generally* Wanat, *supra* note 15, at 59-60 (limitations of *Powell* decision).

[29] 304 U.S. 458 (1938).

[30] *Id.* at 460. The defendant was indicted by the United States Grand Jury for possessing counterfeit money. *Id.* The arraignment, trial, conviction, and sentencing all took place within one day. *Id.*

[31] *Id.* The indigent defendant was unable to employ counsel and therefore requested the assistance of counsel at trial. *Id.* This request was denied because the state in which the federal trial was held appointed counsel only in capital cases. *Id.*

he had received the assistance of counsel guaranteed by the sixth amendment[32] or had knowingly waived his right to counsel.[33]

Although the federal right to counsel in all criminal prosecutions established by *Johnson*[34] could have been applied to the states through the fourteenth amendment,[35] the Supreme Court in *Betts v. Brady*[36] continued to compel states to appoint counsel only in capital cases.[37] In *Betts*, an indigent defendant was indicted for a noncapital felony.[38] The defendant's request for appointment of counsel was denied by the state[39] and he was convicted.[40] The Supreme Court affirmed the conviction, reasoning that the sixth amendment guarantee of the right to counsel was not incorporated into the due process clause of the fourteenth amendment in all circumstances.[41] The Court concluded that

---

[32] *Id.* at 463. The Court recognized that the average defendant did not possess the legal skill required to protect himself against deprivation of liberty. *Id.* at 463-64 (citing Patton v. United States, 281 U.S. 276, 308 (1930)). Only through representation by counsel could the layman have received the constitutional guarantee of a fair trial. *Johnson*, 304 U.S. at 462.

[33] *Johnson*, 304 U.S. at 463. The Court further reasoned that if a federal court did not comply with the sixth amendment mandate, the court would not have proper jurisdiction to proceed with the trial. *Id.* at 468. Thus, any resulting conviction would be void and the convicted defendant would be entitled to release by habeas corpus. *Id.*

[34] *Id.* at 463; *see supra* text accompanying note 32.

[35] *See, e.g.*, Smith v. O'Grady, 312 U.S. 329, 334 (1941)(denial of request to appoint counsel constituted violation of due process clause of fourteenth amendment); Avery v. Alabama, 308 U.S. 444, 446 (1940)(mere formal appointment of counsel without opportunity for consultation and preparation violated fourteenth amendment assistance of counsel guarantee); Grosjean v. American Press Co., 297 U.S. 233, 243-44 (1936)(right to counsel in criminal proceedings protected by both sixth and fourteenth amendments). *See generally* Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1, 52 (1962)(analyzing Supreme Court precedents for extension of right to counsel to all state criminal proceedings).

[36] 316 U.S. 450 (1942).

[37] *Id.* at 471. *See generally* Kamisar, Betts v. Brady *Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219, 222-23 (1962)(state right to counsel under *Betts* extended only to indigent capital defendants).

[38] *Betts*, 316 U.S. at 456. The defendant was indicted for robbery. *Id.*

[39] *Id.* at 457. The defendant was unable to pay for legal assistance and requested court-appointed counsel. *Id.* The trial judge refused to appoint counsel on the ground that under Maryland state law, counsel was provided only in prosecutions for rape and murder. *Id.*

[40] *Id.* The defendant conducted his own defense and was found guilty. *Id.*

[41] *Id.* at 471. The Court reasoned that the right to counsel at the state level was not fundamental to equitable criminal proceedings. *Id.* The Court further noted that the appointment of counsel in noncapital state prosecutions was a matter of judicial discretion. *Id.* at 472.

the right to appointed counsel at the state level would only exist in cases where counsel would be necessary to afford due process of law to an accused.[42]

The Supreme Court then diverged from trial level right-to-counsel analysis and began to review the constitutional rights of convicted defendants in the appellate process.[43] In *Griffin v. Illinois*,[44] the Supreme Court held that where a state grants the right to appellate review,[45] equal justice demands that all defendants be afforded access to the appeals court.[46] State law had required convicted defendants to furnish the appeals court with a report of the trial proceedings in order to receive appellate review of the alleged trial court errors.[47] A convicted indigent defendant,[48] unable to pay for a transcript[49] and thus unable to prepare a report of the proceedings,[50] was denied the right to appeal.[51] The Supreme Court held that the discriminatory denial of the right to appellate review constituted a violation of the equal protection and due process clauses of the fourteenth amendment.[52] The Court

---

[42] *Id.* at 473.

[43] C. WHITEBREAD, CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS 519 (1980). *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 580 (2d ed. 1983)(development of appellate level rights).

[44] 351 U.S. 12 (1956).

[45] *Id.* at 18. In *Griffin*, Illinois state law guaranteed convicted defendants one appeal as a matter of right in all criminal cases. *Id.* at 13.

The due process clause of the fourteenth amendment does not require states to grant appeals as of right to criminal defendants. *E.g.*, McKane v. Durston, 153 U.S. 684, 687-88 (1894)(states are not required by Constitution to maintain appellate courts). State appellate systems may provide both appeals as a matter of right and discretionary appeals. C. WHITEBREAD, *supra* note 43, at 10. An appeal as of right is an automatic appeal from the trial court to an intermediate appellate court. *Id.* A discretionary appeal is a further appeal that may be taken only at the discretion of the appellate court or state supreme court. *Id.*

[46] *Griffin*, 351 U.S. at 19.

[47] *Id.* at 13.

[48] *Id.* The defendant was tried and convicted of armed robbery. *Id.*

[49] *Id.* The defendant was unable to pay the fees required to acquire a stenographic transcript of the trial proceedings. *Id.* at 13. Defendant requested that the transcript be furnished to him without cost. *Id.* The trial court denied this request on the ground that free transcripts were furnished only to indigent convicted defendants sentenced to death. *Id.* at 14.

[50] *Id.* at 13-14. The court acknowledged that it is sometimes impossible to prepare the bills of exceptions and requisite reports without the use of a transcript. *Id.*

[51] *Id.* at 15. Without a transcript of the trial proceedings, the defendant was, perfunctorily, not entitled under state law to appellate review. *Id.* The indigent defendant contended that the trial court's refusal to provide the free transcript deprived him of the fourteenth amendment guarantees of equal protection and due process of law. *Id.*

[52] *Id.* at 18. The Court stated that indigent defendants could not be deprived of

reasoned that where appeals as a matter of right were granted,[53] the fourteenth amendment demanded that all persons receive adequate and effective appellate review.[54]

Under the constitutional mandate of due process and equal protection, the Supreme Court continued to expand the concept of adequate and effective appellate review.[55] In the landmark case of *Douglas v. California*,[56] the right to the assistance of counsel was extended to appellate level proceedings.[57] In *Douglas*, two indigent defendants were convicted and imprisoned.[58] The defendants appealed[59] without the as-

---

adequate appellate review solely because they could not afford to purchase transcripts of the trial. *Id.* at 19. Justice Black, speaking for the Court, reasoned that equal justice demanded that the rich and poor stand before the law on equal ground. *Id.* Where a state grants appellate review, the due process clause and equal protection clause of the fourteenth amendment protect against invidious discrimination at all stages of the appellate process. *Id.* at 18; *see* Smith v. Bennett, 365 U.S. 708, 713-14 (1961)(state may not impose appellate filing fees on indigent defendants); Burns v. Ohio, 360 U.S. 252, 256-58 (1959)(same); *see also* Dowd v. United States, 340 U.S. 206, 207-08 (1951)(suppression of imprisoned defendant's appeal papers violated equal protection clause); Cochran v. Kansas, 316 U.S. 255, 257 (1942)(affording imprisoned defendants right to appeal); Frank v. Mangum, 237 U.S. 309, 327 (1915)(recognizing prisoner's right to appeal).

The Court in *Griffin* concluded that the state's refusal to furnish trial transcripts to the indigent defendants in effect denied adequate review and thus violated the fourteenth amendment guarantees of due process and equal protection. *Griffin*, 315 U.S. at 18; *see, e.g.*, Mayer v. Chicago, 404 U.S. 189, 198 (1971)(requiring state to provide trial transcript to indigent appellant); Draper v. Washington, 372 U.S. 487, 497-500 (1963)(refusal to furnish trial transcript to indigent appellant violated fourteenth amendment); Lane v. Brown, 372 U.S. 477, 484-85 (1963)(discretionary refusal to provide transcript constituted deprivation of right to adequate appellate review); Eskridge v. Washington State Bd. of Prison Terms & Paroles, 357 U.S. 214, 216 (1958)(same).

[53] *Griffin*, 315 U.S. at 18; *see supra* note 45 and accompanying text (discussing appeals as of right).

[54] *Griffin*, 315 U.S. at 19.

[55] *See, e.g.*, Ellis v. United States, 356 U.S. 674, 675 (1958)(appointed counsel must act as advocate in appellate proceeding). *See generally* Note, *Equal Protection and the Indigent Defendant, Griffin and Its Progeny*, 16 STAN. L. REV. 394, 406-07 (1964)(adequacy of appellate proceedings under equal protection clause).

[56] 372 U.S. 353 (1963).

[57] *Id.* at 357-58; *see also* Coppedge v. United States, 369 U.S. 438, 446 (1962)(indigent appellant must be provided with appointed counsel); Johnson v. United States, 352 U.S. 565, 566 (1957)(convicted indigent defendant must be furnished with assistance of counsel on appeal taken in good faith).

[58] *Douglas*, 372 U.S. at 354. The defendants were charged with committing 13 felonies. *Id.* The court-appointed counsel was dismissed by the defendants on the ground that he was unprepared for trial. *Id.* The trial court denied defendants' motion for separate counsel and subsequently the indigent defendants were convicted. *Id.*

[59] *Id.* Under California law, convicted defendants were entitled to one appeal as a matter of right in all criminal prosecutions. *Id.*

sistance of counsel[60] and their convictions were affirmed.[61] The Supreme Court concluded that where a state refuses to appoint counsel to argue an indigent's first appeal as a matter of right, the equal protection clause of the fourteenth amendment has been violated.[62] The Court stated that when an attorney has not been appointed for a petitioner unable to afford retained counsel, the state has drawn an unconstitutional line between the rich and the poor.[63]

The Supreme Court's analysis of the trial level right to counsel recognized that the assistance of counsel must be effective in order to secure equitable criminal trials.[64] Although the right to appointed counsel at trial had been limited in *Betts* to defendants charged with capital offenses,[65] the Supreme Court increasingly found exceptions to the capital rule.[66]

---

[60] *Id.* State law did not provide indigents with appointment of counsel on all appeals. *Id.* at 355. The appointment of appellate counsel was within the discretion of the appellate court. *Id.* Defendants' request for the assistance of counsel was denied. *Id.* at 354.

[61] *Id.*

[62] *Id.* at 356-57. The Court reasoned that in accordance with equality demanded by the equal protection clause and fair procedure demanded by the due process clause, indigent defendants must be afforded the right to appellate counsel. *Id.* at 357. *See generally* J. NOWAK, *supra* note 43, at 580-81 (rights of indigent defendants under equal protection clause).

[63] *Douglas*, 372 U.S. at 357. The Court noted that in accordance with the fourteenth amendment guarantees of equal protection and due process, the merits of a first appeal as of right must be decided with the assistance of counsel whether employed by the defendant or appointed by the state. *Id.*

[64] Wanat, *supra* note 15, at 64-65. Professor Wanat stated that "[t]he right to effective counsel is as necessary as the right to counsel itself." *Id.* at 64; *see, e.g.*, Reece v. Georgia, 350 U.S. 85, 90 (1955)(counsel must be assigned at such time to render effective aid in trial preparation); Glasser v. United States, 315 U.S. 60, 69-70 (1942)(appointed counsel with conflict of interest renders less-than-effective assistance); *see also* White v. Maryland, 373 U.S. 59, 60 (1963)(requiring adequate assistance of counsel in pre-trial procedures); People v. Fryson, 232 N.Y.S.2d 224, 228 (1962)(inadequate representation violates due process of law).

[65] *Betts*, 316 U.S. at 473.

[66] *See, e.g.*, Carnley v. Cochran, 369 U.S. 506, 511-13 (1962)(fourteenth amendment guarantees illiterate noncapital defendant the right to assistance of counsel); Hamilton v. Alabama, 368 U.S. 52, 54-55 (1961)(denial of counsel at time of arraignment violated due process clause); Ferguson v. Georgia, 365 U.S. 570, 596 (1961)(state's refusal to allow direct examination by counsel constituted deprivation of right to effective assistance of counsel); Moore v. Michigan, 355 U.S. 155, 159 (1957)(due process clause of fourteenth amendment guaranteed assistance of counsel to minor defendant); Massey v. Moore, 348 U.S. 105, 108-09 (1954)(insane noncapital defendant has due process right to assistance of counsel); Chandler v. Fretag, 348 U.S. 3, 4, 10 (1954)(extending right to employ counsel to noncapital defendants). *See generally* Beaney, *The Right to Counsel: Past, Pre-*

Gideon v. Wainwright[67] expressly overruled *Betts v. Brady*[68] and provided for the right to counsel in all state criminal proceedings.[69] In *Gideon*, an indigent defendant was charged with a noncapital felony.[70] The defendant's request for assistance of counsel was denied on the ground that state law required appointment of counsel only in capital cases.[71] The defendant conducted his own defense and was convicted.[72] In reversing the conviction,[73] the Supreme Court noted the decision of *Powell*[74] mandating the fourteenth amendment right to counsel in capital criminal proceedings in state courts.[75] The Court then reasoned that the right to counsel is fundamental and essential to all trials and to due process of law.[76] Therefore, the right to counsel should be applied to the states in all criminal cases through the fourteenth amendment.[77] The *Gideon* decision was narrowly interpreted to provide assistance of counsel only in felony cases.[78] The Supreme Court in

---

sent and Future, 49 VA. L. REV. 1150, 1153 (1963)(discussing exceptions to the *Betts* rule).

[67] 372 U.S. 335 (1963).

[68] *Id.* at 339.

[69] *Id.* at 343-45.

[70] *Id.* at 336. The defendant was charged with breaking and entering with intent to commit a misdemeanor. *Id.* Under Florida law, this offense was a felony. *Id.* at 336-37.

[71] *Id.* at 337.

[72] *Id.*

[73] *Id.* at 345.

[74] *Id.* at 343. For a discussion of the *Powell* decision, see *supra* notes 23-28 and accompanying text.

[75] *Powell*, 287 U.S. at 73.

[76] *Gideon*, 372 U.S. at 340-42. Justice Black, writing for the majority, stated that in determining whether a right embraced by the Bill of Rights was applicable to the states through the fourteenth amendment, the Supreme Court looked to the nature of that right. *Id.* at 341. The Court concluded that the right to counsel was fundamental to equitable criminal proceedings and therefore safeguarded by the due process clause of the fourteenth amendment. *Id.* at 342. *See generally* J. BOSTON, *supra* note 15, at 13 (right to counsel under *Gideon*).

[77] *Gideon*, 372 U.S. at 344.

[78] *See, e.g.*, Mempa v. Rhay, 389 U.S. 128, 134 (1967)(interpreting *Gideon* to provide appointment of counsel only in felony cases); Cortinez v. Flournoy, 249 La. 741, 190 So. 2d 909, 909 (1966)(interpreting *Gideon* to be inapplicable in misdemeanor cases); City of Toledo v. Frazier, 10 Ohio App. 2d 51, 54-55, 226 N.E.2d 777, 779 (1967)(denying appointment of counsel in misdemeanor case).

The *Gideon* Court did not limit the holding to felony offenses but stated that anyone "charged with crime" had the right to assistance of counsel. *Gideon*, 372 U.S. at 344. Nevertheless, the decisions following *Gideon* continually limited the right to counsel to defendants charged with felonies. Comment, *Right to Counsel: The Impact of* Gideon v. Wainwright *in the Fifty States*, 3 CREIGHTON L. REV. 103, 103 (1970). *See generally* Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 687-88

Argersinger v. Hamlin[79] expressly extended the right to appointed counsel to persons charged with any criminal offense: felony, misdemeanor, or petty.[80] In *Argersinger*, an indigent defendant was charged with a non-felony offense.[81] The defendant was tried without court-appointed counsel and was convicted.[82] The Supreme Court interpreted *Powell*[83] and *Gideon*[84] to require the appointment of counsel in any criminal trial[85] and reversed the conviction.[86]

In subsequent cases analyzing the right to counsel at the appellate level, the Supreme Court further expanded the *Douglas* mandate of the constitutionally guaranteed right to counsel on a first appeal as a matter of right.[87] The Court refused, however, to extend *Douglas* to discretionary review proceedings in *Ross v. Moffitt*.[88] In *Ross*, a convicted indigent defendant[89] first appealed as a matter of right with the assistance of court-appointed counsel.[90] The defendant's conviction was affirmed[91] and subsequently discretionary review was sought.[92] The

---

(1968)(limitations of *Gideon* decision); Wanat, *supra* note 15, at 61 (same).

[79] 407 U.S. 25 (1972).

[80] *Id.* at 37.

[81] *Id.* at 26. The defendant was charged with carrying a concealed weapon. *Id.* Under Florida law this offense was punishable by imprisonment up to six months. *Id.*

[82] *Id.* The state supreme court provided for the appointment of counsel on appeal only for defendants charged with offenses punishable by imprisonment of more than six months. *Id.* at 27.

[83] *Id.* at 31-33; *see supra* notes 25, 27-28, and accompanying text.

[84] *Argersinger*, 407 U.S. at 31-33; *see supra* notes 76-77 and accompanying text.

[85] *Argersinger*, 407 U.S. at 32. The Court reasoned that the presence of counsel was necessary to ensure that all criminal trials were conducted in accordance with the sixth and fourteenth amendments. *Id.* at 36-37.

[86] *Id.* at 40.

[87] *See, e.g.*, Anders v. California, 386 U.S. 738, 744 (1967)(appointed counsel must act as active advocate on first appeal as of right); Entsminger v. Iowa, 386 U.S. 748, 751 (1967)(effective appellate review requires active role of appointed counsel); Swenson v. Bosler, 386 U.S. 258, 259-60 (1967)(indigent convicted defendant has right to assistance of counsel on first appeal as of right); Hammershoy v. Commonwealth, 398 S.W.2d 883, 884 (1966)(state may not deny indigent defendant appellate counsel on appeal as matter of right). *See generally* K. WELLS & P. WESTON, CRIMINAL PROCEDURE AND TRIAL PRACTICE 205 (1977)(discussing right to counsel in appellate proceedings); Wanat, *supra* note 15, at 63-64 (same).

[88] 417 U.S. 600 (1974).

[89] *Id.* at 603. The defendant, charged with forgery, was represented at trial by appointed counsel and thereafter convicted. *Id.*

[90] *Id.* North Carolina law provided for an appeal as of right in all criminal cases. *Id.* at 613.

[91] *Id.* at 603.

[92] *Id.* Under state law, appellate decisions were reviewed by the state supreme court on a discretionary basis. *Id.* at 613.

North Carolina Supreme Court denied the defendant's request for appointment of counsel on the discretionary appeal.[93] Defendant then petitioned for federal habeas corpus relief.[94] The Court of Appeals for the Fourth Circuit reversed, holding that the right to counsel extended to all appellate proceedings.[95] In reversing the judgment of the Fourth Circuit,[96] the Supreme Court first looked to the equal protection and due process rationales of the *Griffin* and *Douglas* cases.[97] The Court concluded that neither the due process clause[98] nor the equal protection clause[99] of the fourteenth amendment required states to furnish counsel on discretionary appeals.[100] The Court reasoned that under the fourteenth amendment, the appointment of counsel for discretionary review was a matter of state preference.[101]

In assessing the trial level right to counsel, the Supreme Court continued to recognize the necessity of adequate and effective assistance of counsel.[102] In *Cuyler v. Sullivan*,[103] the Supreme Court set

---

[93] *Id.* at 603.

[94] *Id.* The federal district court denied the habeas corpus relief. *Id.* at 603-04.

[95] *Id.* at 604-05. The court of appeals concluded that where a state provides appellate review, either discretionary or as a matter of right, counsel must be provided to all appellants in order to ensure fairness and equality. *Id.* at 605.

[96] *Id.* at 619.

[97] *Id.* at 608-09. Justice Rehnquist, speaking for the Court, noted that the *Griffin* and *Douglas* decisions were based on both the equal protection and due process clauses of the fourteenth amendment. *Id.* at 609. Justice Rehnquist further noted that neither decision rested solely on the equal protection clause or the due process clause; the combined fourteenth amendment clauses provided the basis for both the *Griffin* and *Douglas* cases. *Id.*; *see* Bearden v. Georgia, 461 U.S. 660, 665 (1983)(discussing convergence of equal protection and due process principles in *Griffin* and *Douglas* cases).

[98] *Ross*, 417 U.S. at 610. The Court noted that assistance of counsel at trial is fundamental to due process of law. *Id.* However, due process does not require states to grant every appeal. *Id.* at 611 (citing McKane v. Durston, 153 U.S. 684, 687-88 (1894)). The Court concluded that since states are not compelled by the due process clause to provide appellate review, then the denial of appointed counsel at every stage of appellate proceedings does not violate due process principles. *Ross*, 417 U.S. at 611.

[99] *Ross*, 417 U.S. at 612. The majority stated that absolute equality is not mandated by the fourteenth amendment. *Id.* (citing San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 24 (1973)). The Court held that indigent defendants were not entitled under the equal protection clause to free counsel on discretionary appeals. *Ross*, 417 U.S. at 612.

[100] *Id.* at 615.

[101] *Id.* at 618-19; *accord* Wainwright v. Torna, 455 U.S. 586, 587 (1982)(following *Ross* in denying right to counsel in discretionary state appeal). *See generally* J. NOWAK, *supra* note 43, at 564-65 (discussing discretionary appellate rights).

[102] *See* McMann v. Richardson, 397 U.S. 759, 771 (1970)(felony defendants are entitled to effective assistance of competent counsel); Cross v. United States, 392 F.2d 360, 367 (8th Cir. 1968)(if defendant was denied effective assistance of counsel, new trial

forth the principle that the right to counsel, created by the sixth amendment and made binding on the states through the fourteenth amendment, would not be constitutionally satisfied by ineffective assistance of counsel.[104] In *Cuyler*, two retained attorneys represented the defendant and two codefendants charged with a capital offense.[105] The defendant was the first to be tried.[106] The defense counsel presented no evidence at trial and subsequently the defendant was convicted.[107] The two codefendants were later acquitted.[108] The defendant appealed claiming that his counsel had represented conflicting interests and therefore provided him with ineffective assistance of counsel in violation of the sixth amendment.[109] In assessing the defendant's claim, the

---

should be granted); *see also* Ferri v. Ackerman, 444 U.S. 193, 204-05 (1979)(refusing to grant appellate counsel immunity from malpractice suit); Dukes v. Warden, 406 U.S. 250, 256 (1972)(noting standards for adjudicating ineffective assistance of counsel claim); Chambers v. Maroney, 399 U.S. 42, 59-60 (1970)(Harlan, J., dissenting)(counsel's conduct should not result in effectively denying assistance of counsel); Scott v. United States, 427 F.2d 609, 610 (D.C. Cir. 1970)(recognizing right to adequate counsel derived from fifth and sixth amendments).

The fifth amendment, in pertinent part, provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The due process clause of the fifth amendment guarantees an accused defendant the right to a fair criminal proceeding. J. NOWAK, *supra* note 43, at 534-35. The assistance of the defense counsel may be so inadequate as to constitute a deprivation of the right to a fair trial, thereby violating the due process clause of the fifth amendment. *See, e.g.*, Jones v. Huff, 152 F.2d 14, 15 (D.C. Cir. 1945)(fifth amendment due process clause requires that representation be effective); Diggs v. Welch, 148 F.2d 667, 668-69 (D.C. Cir. 1945)(same).

The sixth amendment guarantees the right to the assistance of counsel. *See supra* note 14 and accompanying text. Where the performance of counsel is so inadequate as to effectively deny assistance of counsel, the sixth amendment guarantee has been violated. United States v. DeCoster, 624 F.2d 196, 218-19 (D.C. Cir. 1976). *See generally* Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 31-32 (1973)(necessity of effective and adequate representation at trial).

[103] 466 U.S. 335 (1980).

[104] *Id.* at 344.

[105] *Id.* at 337. The three defendants were indicted on two first-degree murder charges. *Id.*

[106] *Id.* at 338.

[107] *Id.* The defendant was found guilty on circumstantial evidence and was sentenced to life imprisonment. *Id.*

[108] *Id.*

[109] *Id.* The defendant alleged that in representing the three codefendants, the defense counsel had a conflict of interest. *Id.* In support of this allegation, defendant claimed that his defense had been rested without evidence because counsel did not want to jeopardize the trials of the two codefendants. *Id.* at 339. The defendant asserted that the conflict of interest deprived him of effective representation. *Id.*

Supreme Court recognized that the right to counsel must include the right to effective assistance of counsel in order to ensure that defendants are not unconstitutionally deprived of their liberty.[110] The Court further reasoned that the right to effective representation encompassed both counsel retained by defendants and counsel appointed by the state.[111]

In the instant case, the Supreme Court reasoned that since the right to counsel at trial encompassed the right to effective assistance of counsel, then the right to counsel on a first appeal as a matter of right also encompassed the right to effective assistance of counsel.[112] The Court maintained that since nominal representation by counsel would not afford constitutionally adequate appellate proceedings,[113] then the right to counsel on appeal would be a futile gesture if it did not include the right to effective assistance of counsel.[114] Since the due process

---

[110] *Id.* at 344. The Court reasoned that inadequate legal assistance would deprive defendants of the right to a fair trial in violation of the due process clause of the fourteenth amendment. *Id.* at 343. *See generally* Bazelon, *supra* note 102, at 22-23 (need for effective representation); Wanat, *supra* note 15, at 65-66 (same).

[111] *Cuyler*, 446 at 344-45. In Strickland v. Washington, 104 S. Ct. 2052 (1984), the Supreme Court for the first time articulated the standard to be used in assessing ineffective assistance of counsel claims at the trial level. *Id.* at 2062. The Court noted that claims of ineffective counsel were to be evaluated by an objective standard of reasonableness. *Id.* at 2065. The Court further noted that in every case there is a strong presumption that assistance provided by counsel was reasonable. *Id.* at 2066. The court in *Strickland* then set forth the following guidelines to be used in adjudicating ineffective assistance of counsel claims:

> A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Id. See generally Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289, 298-300 (1964)(necessity of adequate retained and appointed counsel).

[112] *Evitts*, 105 S. Ct. 830, 836 (1985). The Court recognized that the Supreme Court cases granting the right to effective counsel at trial and the Supreme Court cases granting the right to counsel on an appeal as of right intersected in the present case. *Id.* The Court noted that the two lines of cases converged to establish the right to effective assistance of counsel on a first appeal as of right. *Id.*

[113] *Id.* Justice Brennan, writing for the Court, maintained that the requirement of more than mere nominal representation at the trial level must extend to the appellate level if an appellant is to receive a fair decision on the merits of his appeal and not be unconstitutionally deprived of his liberty. *Id.*

[114] *Id.* at 837. The Court further noted that where the right to appeal has been granted by the state, ineffective assistance of counsel would result in a denial of this right. *Id.* at 838.

clause of the fourteenth amendment guarantees the right to counsel on a first appeal as of right, then the Court concluded that the due process clause also guarantees the right to effective assistance of counsel on appeal.[115] Consequently, the Court held that since defendant's ineffective representation on appeal deprived him of an appeal on the merits of the case, the defendant had been denied the constitutionally guaranteed right to effective assistance of counsel.[116]

In a dissenting opinion, Justice Rehnquist,[117] joined by Chief Justice Burger,[118] argued that the due process clause of the fourteenth amendment did not provide for the right to effective counsel on appeal.[119] The dissent maintained that the Court's precedents for the right to counsel at the appellate level were based primarily on the equal protection clause of the fourteenth amendment, not both the equal protection and due process clauses of that amendment as the majority had reasoned.[120] Therefore, the due process clause did not encompass the right to effective assistance of counsel on an appeal as of right.[121] Justice Rehnquist then maintained that the right to effective assistance of counsel applied only to trial proceedings and did not extend to the appellate level.[122] In conclusion, the dissent argued that the

---

[115] *Id.* at 840-41. The state alleged that the right to appellate counsel was based solely on the equal protection clause of the fourteenth amendment and that the right to effective assistance of trial counsel was based solely on the due process clause of the fourteenth amendment. *Id.* at 839. The state claimed that since the two rights have as their basis two separate constitutional principles, then the due process clause cannot demand the effective assistance of counsel on appeal. *Id.*

In response to the state's arguments, the Court maintained that the right to counsel on a first appeal as of right was supported by both the due process clause and the equal protection clause of the fourteenth amendment. *Id.* at 840. The Court reasoned that in accordance with the fourteenth amendment due process clause, the right to effective assistance of counsel is encompassed by the right to counsel on a first appeal as of right. *Id.* at 836.

[116] *Id.* at 837.

[117] *Id.* at 841 (Rehnquist, J., dissenting).

[118] *Id.* In a separate dissent, Chief Justice Burger charged the majority with unduly burdening the criminal justice system by extending the trial level right to effective assistance of counsel to the appellate level. *Id.* at 841 (Burger, C.J., dissenting).

[119] *Id.* at 841 (Rehnquist, J., dissenting).

[120] *Id.* at 842. The dissent reasoned that the line of cases giving rise to the right to counsel on appeal had as a common factor indigent criminal appellants unable to afford the means to adequately appeal a conviction. *Id.* To enable the indigents to stand on equal ground with appellants able to afford the necessary appellate requirements, the cases held that in accordance with the equal protection clause of fourteenth amendment, a state must provide all criminal appellants meaningful access to its appellate courts. *Id.*

[121] *Id.*

[122] *Id.* The dissent maintained that only at the trial level were the due process con-

majority decision prevented state courts from effectively enforcing procedural appellate rules.[123]

While the Supreme Court has long recognized the right to counsel as fundamental to equitable criminal proceedings,[124] effective representation has been expressed as a necessary corollary of the right to counsel.[125] The decision in *Evitts* constitutionally mandates that a defendant has the right to effective assistance at all stages of a criminal proceeding in which there is a right to counsel.[126] Although the dissent contends that only at the trial level is the protection of one's liberty so vital as to mandate the due process guarantee of effective assistance of counsel,[127] the Supreme Court has consistently maintained that both trial and appellate proceedings must be conducted in accordance with the fundamental constitutional doctrine of due process of law.[128] While the instant decision may increase applications for writs of habeas corpus[129] and further burden the courts,[130] the foremost concern of the judicial system must be the rights of the individual.[131] By giving the criminal appellant an enforceable right to effective representation, the Court ensures that first appeals as a matter of right afford the necessary procedural safeguards mandated by the due process clause of the fourteenth amendment.[132]

Joli E. Boardman

---

cerns of deprivation of liberty so compelling that a criminal defendant, as a matter of right, be guaranteed effective assistance of an attorney, whether retained or appointed. *Id.*

[123] *Id.* at 844. The state also urged that appellate rules would not be reasonably obeyed if state appellate courts were precluded from enforcing procedural rules through the dismissal of appeals. *Id.* at 837. The majority responded to this argument by stating that instead of dismissing an appeal and punishing a criminal defendant, while infringing the defendant's due process rights, the state could impose sanctions against the attorney. *Id.* The dissent also maintained that as a result of the majority opinion, lawfully convicted criminals could petition for federal habeas corpus relief alleging defective assistance of appellate counsel, even though no basis for an appeal on the merits of the case existed. *Id.* at 844.

[124] *See supra* notes 24, 32, 62, 76, and accompanying text.

[125] *See supra* notes 64, 102, 110, and accompanying text.

[126] *See supra* notes 112-14 and accompanying text.

[127] *Evitts*, 105 S. Ct. at 842-43 (Rehnquist, J., dissenting); *see supra* note 122.

[128] *See supra* notes 21, 52, 55, 62, 76, 110, and accompanying text.

[129] *Evitts*, 105 S. Ct. at 844 (Rehnquist, J., dissenting).

[130] *Id.* at 841 (Burger, C.J., dissenting).

[131] *See supra* notes 32, 52, 102, 110, and accompanying text.

[132] *See supra* notes 113-15 and accompanying text.

Torts—Misrepresentation—Mississippi's Path From Fraud and Scienter to Negligent Misrepresentation

Plaintiff[1] filed an action for damages in the Circuit Court of DeSoto County, charging defendant bank[2] with material misrepresentation[3] of the credit worthiness of a customer.[4] Plaintiff received a positive credit reference from defendant bank regarding the customer[5] and thereafter accepted credit orders from the customer for which payment was not received.[6] Plaintiff alleged that in reliance on the allegedly material misrepresentations of defendant bank, it extended credit to the customer.[7] The defendant bank claimed that the information was accurate when it was given and that it did not intend for plaintiff to detrimentally rely on the credit reference.[8] The circuit court, finding no de-

---

[1] Plaintiff, Berkline Corporation, was a Delaware corporation which sold furniture to retailers. Berkline Corp. v. Bank of Mississippi, 453 So. 2d 699, 700 (Miss. 1984).

[2] The defendant, Bank of Mississippi, became involved in this suit via the conduct of one of its Olive Branch, Mississippi bank officers. *Id.* at 700.

[3] *Id.* at 700-01. The thrust of the misrepresentation allegation was that the bank erroneously advised the plaintiff corporation that a particular bank customer was fiscally stable and exercised good business practices. *Id.*

[4] *Id.* The customer, Furniture City, Inc., was incorporated in Tennessee in 1978 by Don Culbreath and others. Shortly thereafter, Furniture City placed its first order with the plaintiff. *Id.* at 700. The plaintiff sought to recover actual and punitive damages pursuant to its allegation of fraudulent misrepresentation. *Id.* at 700-01.

[5] *Id.* at 700. In response to the order from Furniture City, Berkline's credit manager sought a credit reference from the defendant. The defendant bank's response by letter, dated July 31, 1978, and signed by loan officer Steve Smith, stated, in pertinent part:

> Furniture City, Inc. has an active line of credit with the Bank of Mississippi in the low six figure range. They have two deposit accounts with us. One account is a savings in the low six figure range and the other is a commercial checking account with average balances in the low five figure range. All deposit accounts and credit experience have been handled in a satisfactory manner. The principals of the corporation have, in past experience with our bank, demonstrated sound business judgment . . . .

Id.

[6] *Id.* The plaintiff shipped orders, on credit, for the customer with a total wholesale value of about $10,000. *Id.*

[7] *Id.* at 700-01.

[8] *Id.* at 701. The defendant bank also asserted that the plaintiff had relied on other information in making its credit decision. Testimony at trial evidenced that plaintiff's credit manager discussed the customer's default with the defendant bank on December 13, 1978. The loan officer who had written the July 31 reference letter was no longer an employee of the defendant bank, and a bank employee allegedly stated that Furniture City had had no banking accounts with the defendant bank in the amounts stated in the

ceit,[9] sustained the defendant's motion to dismiss the declaration.[10] On appeal, the Supreme Court of Mississippi, *held*, reversed and remanded. When a party, by a preponderance of the evidence, shows that a banking institution misrepresented or failed to disclose a material fact in responding to a credit inquiry, and that by making such a response, the banking institution failed to exercise that degree of diligence and expertise the public is entitled to expect of reasonably competent banking institutions, the complaining party may recover from the banking institution for negligent misrepresentation if the complaining party reasonably relied upon the misrepresentation or omission and suffered damages as a direct and proximate consequence of such reliance. *Berkline Corp. v. Bank of Mississippi*, 453 So. 2d 699 (Miss. 1984).

Although scholars trace the origins of liability for fraudulent misrepresentation to the thirteenth century,[11] recovery for negligent misrepresentation was originally denied. It is the design of this note to trace the evolution of the law of misrepresentation from its origins in fraud, or deceit,[12] to the eventual recognition of an action sounding in negligent misrepresentation.

Early deceit actions were restricted to narrowly defined situations[13] and were available only to parties in contractual privity.[14] The privity requirement was eventually abolished,[15] and courts came ulti-

---

July 31 reference letter. Plaintiff's credit manager then spoke with a vice president of the defendant bank who, according to testimony, told plaintiff's credit manager that the defendant bank was itself having trouble collecting fifty to sixty thousand dollars in debts from the customer. *Id.*

[9] *Id.* The supreme court noted that the circuit court judge apparently considered this action strictly a fraudulent misrepresentation case and ruled that plaintiff had failed to prove the "elements of a fraud case." *Id.*

[10] *Id.*

[11] W. PROSSER & W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS § 105, at 727 (5th ed. 1984)(hereinafter cited as W. PROSSER). Prosser noted that the writ of deceit was available as early as 1201 a.d. *Id.*

[12] For purposes of convenience and uniformity, the term "deceit" will hereinafter be used to refer to the cause of action generally known as "deceit," "fraud," or "fraudulent misrepresentation."

[13] W. PROSSER, *supra* note 11, at 727-28. In its genesis, a deceit action was permitted only against a party who had misused the law for "swindling" another. *Id.*

[14] *Id.* at 728.

[15] *Id.* By abolishing the privity requirement, the courts transformed a deceit action from one in contract to one in tort. *Id.* In the late eighteenth century, a deceit action was permitted against a party not in privity with the plaintiff. Pasley v. Freeman, 3 Term Rep. 51, 100 Eng. Rep. 450 (1789). The *Pasley* case was termed "the parent of the modern law of deceit." W. PROSSER, *supra* note 11, at 728.

mately to define deceit[16] as an intentional misrepresentation of material fact[17] on which the hearer reasonably relied[18] and by which the hearer was proximately damaged.[19] In order for a deceit action to suc-

---

[16] RESTATEMENT (SECOND) OF TORTS § 525 (1977) states:

> One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.

[17] Franklin v. Lovitt Equip. Co., 420 So. 2d 1370, 1373 (Miss. 1982). The Mississippi Supreme Court has ruled that a representation by an automobile salesman that a car was a 1933 model when it was actually a 1932 model was a material misrepresentation. Williams v. McClain, 180 Miss. 6, 13, 176 So. 717, 719 (1937). A hearer is not entitled to rely on a mere expression of opinion, Deshatreaux v. Batson, 159 Miss. 236, 243, 131 So. 346, 348 (1930), or on a representation of the law, Johnson v. Brewer, 427 So. 2d 118, 121 (Miss. 1983). *But see supra* note 16 (RESTATEMENT (SECOND) OF TORTS § 525 (1977) would allow recovery for fraudulent misrepresentations of opinion and law). Generally, an action for deceit was not sustainable on the basis of promises of future action; the representations must have been of presently existing or past facts. *See, e.g.,* Freeman v. Continental Gin Co., 381 F.2d 459, 468, *reh'g denied*, 384 F.2d 365 (5th Cir. 1967)(mere fact that promise was broken was not sufficient to sustain fraud action); House v. Holloway, 258 So. 2d 251, 253 (Miss. 1972)(fraud action based on promise of future conduct not sustainable); Credit Indus. Co. v. Adams County Lumber & Supply Co., 215 Miss. 282, 290, 291, 60 So. 2d 790, 794 (1952)(action for fraud must have been based on present or past facts and not mere unfulfilled promise of future performance). *But cf.* Kidd v. Kidd, 210 Miss. 465, 472-73, 49 So. 2d 824, 827 (1951)(claim based on promise of future action sustainable where relation of trust and confidence existed between parties and matter was peculiarly within speaker's knowledge).

[18] Franklin v. Lovitt Equip. Co., 420 So. 2d 1370, 1373 (Miss. 1982). The reliance by the plaintiff must be justifiable. *Id.* It has been held that "[a] person dealing with another may assume that the representations made by such other person are true." Streator v. State, 180 Miss. 31, 41, 177 So. 54, 56 (1929). However, the representation must have been one upon which a reasonable person would rely. Pilot Life Ins. Co. v. Wade, 153 Miss. 874, 879, 121 So. 844, 845 (1929). The reliance of one party on the words of another has been the key concept in the development of the theory of promissory estoppel. *See, e.g.,* Sanders v. Dantzler, 375 So. 2d 774, 776 (Miss. 1979)(defendant, who made oral contract on which plaintiff relied to his detriment, was estopped from asserting statute of frauds as defense). Reliance has also been the foundation of the analogous principle of equitable estoppel. *See, e.g.,* PMZ Oil Co. v. Lucroy, 449 So. 2d 201, 206 (Miss. 1984)(unrecorded covenant to restrict land use enforced because plaintiff detrimentally changed his position by investing in land in reliance on convenant).

[19] Franklin v. Lovitt Equip. Co., 420 So. 2d 1370, 1373 (Miss. 1982). The damage to the plaintiff must have been proximately caused by the reliance on the defendant's misrepresentation. *Id.* The several elements of deceit have been repeatedly listed by the Mississippi Supreme Court. *See, e.g.,* McMahon v. McMahon, 247 Miss. 822, 836, 157 So. 2d 494, 501 (1963)(deceit by concealment); Anderson Dunham, Inc. v. Aiken, 241 Miss. 756, 761, 133 So. 2d 527, 529 (1961)(misrepresentation of load capacity of dump trailers); Gardner v. State, 235 Miss. 119, 130, 108 So. 2d 592, 594 (1959)(misrepresentation of amount of acres involved in sale of mineral rights).

ceed, it is essential that the complainant prove that the defendant acted with scienter.[20] *Derry v. Peek*[21] was the landmark English case[22] developing the requirement of scienter. In *Derry*, the defendants represented that their company had procured the authority to use steam or mechanical power to propel tramway carriages.[23] In fact, the company had not secured such authority.[24] Plaintiff purchased shares of stock in the company[25] and, after he discovered the claim was false, brought an action for deceit.[26] At the time of their representation, defendants believed that the company had either already obtained permission to use

---

[20] Franklin v. Lovitt Equip. Co., 420 So. 2d 1370, 1373 (Miss. 1982). Scienter is the knowledge or belief by a speaker that a given representation is false. Scienter is also present when a speaker makes a representation "without any belief as to its truth, or with reckless disregard whether it be true or false." W. PROSSER & W. KEETON, *supra* note 11, at 728, 741-42; *see also* Howard v. Gould, 28 Vt. 523 (1856)(speaker liable in deceit because he knowingly suppressed a material fact). The New Hampshire Supreme Court found a speaker liable in deceit because he had no belief in the truth of his statement. Shackett v. Bickford, 74 N.H. 57, 65 A. 252, 253 (1906). In some instances, courts have held the speaker liable in deceit for misrepresentations made in good faith. *See* Clark v. Haggard, 141 Conn. 668, 109 A.2d 358, 361 (1954)(deceit inferred from inaccurate good faith statements about number of units in tract of land where vendor based statements on informal talks with prior owner); Lanning v. Sprague, 71 Idaho 138, 227 P.2d 347, 350 (1951)(dicta)(deceit inferred from inaccurate good faith statements concerning boundaries of tract of land); Dunn v. Dent, 169 Miss. 574, 577, 153 So. 798, 799 (1934)(deceit action sustained, in vendor-vendee situations, where vendor made false representation, in good faith, as to the amount of acreage involved in a sale); Lundy v. Hazlett, 147 Miss. 808, 820, 112 So. 591, 592 (1927)(same). A fraud action was sustained when false statements were made with an inexcusable disregard for accuracy. Rhyne v. Gammil, 215 Miss. 68, 77, 60 So. 2d 500, 501-502 (1952)(seller of business misrepresented amount of accounts payable). The Second Restatement of Torts states that scienter is present so as to make one liable for deceit if the speaker:

> (a) knows or believes that the matter is not as he represents it to be,
>
> (b) does not have the confidence in the accuracy of his representation that he states or implies, or
>
> (c) knows that he does not have the basis for his representation that he states or implies.

RESTATEMENT (SECOND) OF TORTS § 526 (1977).

[21] 14 App. Cas. 337 (1889).

[22] *See* W. PROSSER & W. KEETON, *supra* note 11, at 740-42.

[23] 14 App. Cas. at 338. Prior to the 1870 Tramways Act, all carriages had been driven by animal power only. The act provided that vehicles approved by the Board of Trade would be permitted to use steam or mechanical power. A prospectus issued by defendants stated that the company had obtained such permission. *Id.*

[24] *Id.*

[25] *Id.* The plaintiff charged he relied on the prospectus believing the company had the absolute right to use steam and other mechanical power. *Id.*

[26] *Id.*

steam or mechanical power, or that such permission was assured.[27] The court held that in order for an action in deceit to proceed, the plaintiff must prove that the defendant made the statement "(1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false."[28] This element of the deceit action is commonly known as "scienter."[29]

Many American courts accepted the *Derry* principle as sound,[30] but some American courts restricted deceit actions to situations where privity existed and the representation was made directly by the defendant to the plaintiff,[31] or where the plaintiff had no opportunity to

---

[27] *Id.* at 340-41. The trial court dismissed the action, finding no conduct by the defendants justifying liability for deceit. *Id.* at 338, 340. An appellate court reversed the trial court, stating that the defendants were liable because they published the information without any reasonable grounds for believing it was true. *Id.* at 338, 344.

[28] *Id.* at 374. The *Derry* court expressly ruled that a deceit action must be based upon scienter and was not sustainable where negligently made. *Id.* at 375. The court also noted that a defendant's honest belief in the truth of his statement precluded a deceit action. *Id.* at 374. The English court abided by the *Derry* scienter requirement until the early 1960s when the courts finally sustained causes of action for mere negligent misrepresentation. *See* Hedley Vyrne & Partners, Ltd. v. Heller, 1964 A.C. 465 (banker's negligent misrepresentation of customer's financial status sufficient basis for liability). *See generally* W. PROSSER & W. KEETON, *supra* note 11, at 746 (general discussion of historical background of English recognition of negligent misrepresentation action).

Early Mississippi cases, decided before *Derry v. Peek*, had made scienter an indispensable element of fraud. In Sims v. Eiland, 57 Miss. 83, 83 (1879), the plaintiffs sued the defendants who had signed a letter vouching for the credit worthiness of a third person. Plaintiffs alleged they extended credit to the third person on the basis of the letter, and that the third person actually was insolvent and unworthy of credit. *Id.* The Mississippi Supreme Court held that knowledge of falsity on the part of the defendant was essential to sustain a deceit action. *Id.* at 84. Earlier, in Taylor v. Frost, 39 Miss. 328 (1860), plaintiff sued defendant for allegedly misrepresenting the qualities of a horse. The supreme court held that a plaintiff must prove knowledge of falsity on the part of a defendant in order for an action in deceit to lie. *Id.* at 330.

[29] W. PROSSER & W. KEETON, *supra* note 11, at 728, 741-42.

[30] *See, e.g.*, Wishnick v. Frye, 111 Cal. App. 2d 926, 245 P.2d 532, 534-35 (1952)(restated three-prong test of scienter set forth in *Derry*); Lambert v. Smith, 235 Md. 284, 201 A.2d 491, 493-94 (1964)(knowledge of falsity or reckless indifference to truth required to sustain deceit action). *But cf.* W. PROSSER & W. KEETON, *supra* note 11, at 740 (states paid "lip service" to *Derry v. Peek* while fashioning various fictions which permitted recovery without actual intent to deceive). *See generally* Keeton, *Fraud: The Necessity for an Intent to Deceive*, 5 U.C.L.A. L. REV. 583 (1958)(discussion of controversy in American courts over *Derry* doctrine).

[31] *See, e.g.*, Merchants' Nat'l Bank v. Armstrong, 65 F. 932, 937-38 (S.D. Ohio 1895)(no liability for intentional misrepresentation unless defendant communicates statement directly to plaintiff and defendant and plaintiff are in privity of contract). *But see* Bank of Montreal v. Thayer, 7 F. 622, 626 (D. Iowa 1881)(no privity or direct misrepresentation required); Genessee Sav. Bank v. Barge Co., 52 Mich. 164, 17 N.W. 790,

investigate the truthfulness of the statements.[32]

Two decades after *Derry*, the Mississippi Supreme Court elaborated on the *Derry* formulation in *Vincent v. Corbitt*.[33] In *Vincent*, the plaintiff sued for deceit after he discovered that the number of acres and tenant houses which he purchased from the defendant had been misrepresented.[34] The court stated that scienter was established when a claimant proved that a defendant knew his statement was false;[35] was reckless when he made the statement;[36] made the statement as if he had knowledge of the subject matter of the statement when in fact he had no such knowledge;[37] or made the statement without knowledge when, because of his position, he should have known of its truth or falsity.[38] According to the court, the *Vincent* decision did not eliminate the necessity of proving scienter in a deceit action, but merely articulated the manner in which scienter may be demonstrated.[39] The *Vin-*

---

793 (1883)(same).

[32] *See* Reynolds v. Palmer, 21 F. 433, 434 (W.D.N.C. 1884)(purchaser who does not use opportunity to inspect goods may not recover in fraud for seller's misrepresentation when inspection would have revealed defect). Some American jurisdictions permitted negligent misrepresentations to sustain fraud actions in particular circumstances; for example, when a warranty existed, McLeod & Wife v. Tutt, 2 Miss. 288, 291 (1836)(defendant liable in deceit for false express warranty irrespective of absence of scienter on defendant's part); when the statement was made to induce the plaintiff to contract with the defendant, Aldrich v. Scribner, 154 Mich. 23, 117 N.W. 581, 584-85 (1908); where the false statement was susceptible of knowledge by misrepresenter, although he believed his misstatement to be true, Kirkpatrick v. Reeves, 121 Ind. 280, 22 N.E. 139, 140 (1889); where the representer had a duty to know the facts, Whitehurst v. Life Ins. Co. of Va., 149 N.C. 273, 62 S.E. 1067, 1068 (1908); where plaintiff sought equitable relief, Straus v. Norris, 77 N.J. Eq. 33, 75 A. 980, 981 (1910)(negligent misrepresentation of amount of acreage); or where a vendor-vendee relationship existed between the parties, Hastings v. Bain, 151 Va. 976, 145 S.E. 735, 738 (1928)(vendor innocently misrepresented location of land; location a factor influencing vendee to purchase); Pratt v. Thompson, 133 Wash. 218, 233 P. 637, 638 (1925)(innocent misrepresentations by vendor constituted fraud in law). A minority of courts in the United States simply rejected the *Derry* principle. W. PROSSER & W. KEETON, *supra* note 11, § 107, at 740.

[33] 94 Miss. 46, 47 So. 641 (1908).

[34] *Id.* at 53, 47 So. at 641.

[35] *Id.* at 54, 47 So. at 642.

[36] *Id.* The court said that recklessness could have been proven by showing the defendant did not care if the statement was true or by showing he made the statement with "conscious ignorance of its truth." *Id.* at 55, 47 So. at 642.

[37] *Id.* at 54-55, 47 So. at 642. The court pointed out that in a fraudulent misrepresentation action, a statement made as of knowledge did not include a statement of opinion; the statement must have been one "susceptible of knowledge." *Id.*

[38] *Id.* at 57, 47 So. at 643.

[39] *Id.* at 57-58, 47 So. at 643. The court stated that the types of scienter delineated in the opinion were equivalent in law to "actual, positive knowledge of falsity." *Id.* The

cent case was the central authority cited by Mississippi courts in subsequent deceit cases.[40] For example, in *Mayfield Motor Co. v. Parker*,[41] an automobile dealership[42] was found liable for damages after selling a 1946 automobile which it had represented as a 1948 model.[43] In affirming the jury verdict[44] for the plaintiff, the *Parker* court approved the language of the *Vincent* case[45] and stated that the dealer ought to have known the statement was false, even if he had no actual knowledge, since a "reasonable examination" would have determined the automobile to be a 1946 model.[46] Even though the court used a reasonableness standard,[47] it characterized the action as one in deceit[48] and

---

Vincent court also discussed the cases of Sims v. Eiland, 57 Miss. 83 (1879), and Taylor v. Frost, 39 Miss. 328 (1860), both of which stated that the defendant's actual knowledge of falsity was necessary to maintain a deceit action. *Vincent*, 94 Miss. at 56-57, 47 So. at 643. The *Vincent* opinion stated that *Sims* and *Taylor* dealt primarily with other issues (sufficiency of a demurrer and correctness of jury instructions, respectively) and were not exhaustive on the question of how scienter might be established. *Id.; see supra* note 28.

[40] *See, e.g.*, Felts v. National Account Sys. Ass'n, 469 F. Supp. 54, 67 (N.D. Miss. 1978)(reiterated scienter rules developed in *Vincent*); H.D. Sojourner & Co. v. Joseph, 186 Miss. 755, 768, 191 So. 418, 421 (1939)(same). In addition to reinforcing the types of scienter enunciated in *Vincent*, the *Sojourner* court held that the representation did not have to be the sole cause of the plaintiff's action, but could still be the basis for liability if it were one inducement and amounted to a "material influence." *Sojourner*, 186 Miss. at 768, 191 So. at 421 (quoting 26 C.J. *Fraud* § 76 ½ (1921)). The latter principle concerning inducement to action was followed in the *Felts* case. *Felts*, 469 F. Supp. at 67.

[41] 222 Miss. 152, 75 So. 2d 435 (1954).

[42] The defendant, Mayfield Motor Co., Inc., was bound by the actions of its agent salespersons who dealt with plaintiff. *See id.* at 157, 159, 75 So. 2d at 436.

[43] *Id.* at 158, 75 So. 2d at 436. The agent told plaintiff the car was a 1948 model and the bill of sale stated the model year as 1948. *Id.* At trial, the agent testified that he thought the automobile was a 1948 model because that was what the previous owner's husband told him when the company acquired the car. *Id.* Misrepresentation of the model year of an automobile had been held to be material. *Id.* (citing Williams v. McClain, 180 Miss. 6, 13, 176 So. 717, 719 (1937)).

[44] *Mayfield*, 222 Miss. at 161, 75 So. 2d at 438. The jury awarded the plaintiff $300, the difference in value of a 1948 model and the 1946 model sold to the plaintiff. *Id.* at 158, 75 So. 2d at 436-37.

[45] *Id.* at 159, 75 So. 2d at 437.

[46] *Id.* The court noted that evidence adduced at trial showed that although the difference in the two model years was not detectable to the average person, the model year could have been easily verified. *Id.* at 158, 75 So. 2d at 436. For example, the court stated that the different cars were distinguishable by the covers over the door locks or by the serial numbers, either of which the dealer could have checked. *Id.*

[47] *Id.* at 159, 75 So. 2d at 437. The fictitious reasonable person has been the standard for defendants in actions based on negligence. W. PROSSER & W. KEETON, *supra* note 11, § 32, at 173. It has been suggested that due to contradictory language in court opinions, it is sometimes difficult to ascertain the precise ground upon which the court founded liability. Keeton, *supra* note 30, at 598. Professor Keeton said it is sometimes

expressly applied the long-standing rule that deceit must be proved by clear and convincing evidence.[49]

---

unclear whether courts based liability in negligence or, by inferring knowledge of falsity from the fact that the representer ought to have known, based liability in fraud. *Id.*

[48] *Mayfield*, 222 Miss. at 159, 75 So. 2d at 437. Some commentators took a different view of the grounds for liability in the *Mayfield* decision. Professor Keeton believed that the Mississippi Supreme Court, without saying so, actually established a cause of action for negligent misrepresentation. Keeton, *supra* note 30, at 598. Professor Keeton stated that the *Mayfield* court evidently intended to allow negligence as the basis of liability and that the court considered the salesman-agent negligent as a matter of law. *Id.* It was also suggested that the *Mayfield* decision was a blending of negligence language with the less culpable conduct of the traditional fraud cause of action. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L REV. 1113, 1168 (1974). *But cf.* Sims v. Frady, 461 F. Supp. 736, 739 (N.D. Miss. 1978)(quoted *Mayfield* language but characterized the action as one in fraud).

More than twenty years after *Mayfield*, the Mississippi Supreme Court adhered to the *Mayfield* rule in *Seaboard Planning Corp. v. Powell*, 364 So. 2d 1091 (Miss. 1978). The plaintiffs, the Powells, were an elderly retired farm family with "limited education," who sued the Seaboard Corporation after the corporation's agent recommended investing in the company and guaranteed a rate of interest as well as the liquidity of the investment. *Id.* at 1093. The suit was brought under MISS. CODE ANN. § 75-71-25 (1972)(repealed 1981), a Blue Sky law that regulated securities transactions in Mississippi. *Seaboard Planning*, 364 So. 2d at 1092, 1095-97. The statute stated that any person induced to purchase securities by means of material misrepresentation could sue to recover the purchase price, other consideration, interest from the date of payment, and reasonable attorney's fees. MISS. CODE ANN. § 75-71-25 (1972)(repealed 1981). In affirming a finding of fraud, the court, relying on *Mayfield*, held that the agent should have known the statements were false. *Seaboard Planning*, 364 So. 2d at 1094. In so holding, the court openly dispensed with the requirement of actual knowledge, stating: "[s]cienter in a literal sense is not an essential ingredient of actionable fraud. . . ." *Id.*

[49] *Mayfield*, 222 Miss. at 160, 75 So. 2d at 437. The clear and convincing evidence standard is a well-settled rule in deceit cases. *See, e.g.*, Vogel v. American Warranty Home Serv. Corp., 695 F.2d 877, 882 (5th Cir. 1983)(deceit charge against insurer of limited home warranty had to be proved by clear and convincing evidence); Dabbs v. Int'l Minerals & Chem. Corp., 339 F. Supp. 654, 661 (N.D. Miss. 1972), *aff'd*, 474 F.2d 1344 (5th Cir. 1973)(clear and convincing evidence necessary to prevail in deceit action against assignor of mineral royalty contract); Levi v. Mississippi State Bar, 436 So. 2d 781, 783 (Miss. 1983)(disciplinary action by state bar association against attorney for alleged involvement in fraud required clear and convincing evidence); Ray v. Acme Fin. Corp., 367 So. 2d 186, 187 (Miss. 1979)(deceit allegation against makers and cosigners of promissory note not sustainable absent clear and convincing evidence); Hamilton v. McGill, 352 So. 2d 825, 831 (Miss. 1977)(clear and convincing evidence required in deceit action against land vendor who stated that land was not susceptible to overflow and flood damage ensued); McMahon v. McMahon, 247 Miss. 822, 836, 157 So. 2d 494, 501 (1963)(deceit action alleging forged quitclaim deed must have been supported by clear and convincing proof).

An aberration in the clear and convincing evidence standard in deceit cases occurred

In the late nineteenth and early twentieth centuries, several American courts began to recognize a misrepresentation action sounding in negligence rather than deceit.[50] Suits in negligent misrepresentation were allowed to proceed where the speaker was expected to have a certain level of competence,[51] or where the subject matter of the representation demanded that the representer speak with care.[52] Although courts were initially reluctant to impose liability for negligent misrepresentations which resulted only in pecuniary loss,[53] some courts did allow recovery for such loss if there was privity of contract between the representer and the hearer.[54] Eventually, this privity requirement was

---

in Columbian Mut. Life Ins. Co. v. Harrison, 170 Miss. 121, 154 So. 722 (1934). In that case, the court held that deceit must be proved by a preponderance of the evidence. *Id.* at 124, 154 So. at 723. Inexplicably, the *Harrison* case was subsequently twice cited as authority for the clear and convincing evidence standard in deceit cases. Hunt v. Sherrill, 195 Miss. 688, 696 n.2, 15 So. 2d 426, 428 n.2 (1943); Grenada Auto Co. v. Waldrop, 188 Miss. 468, 474, 195 So. 491, 493 (1940).

[50] *See infra* notes 51-55 and accompanying text; *see also* Mid State Homes, Inc. v. Startley, 366 So. 2d 734, 735 (Ala. Civ. App. 1979)(mortgagee negligently misrepresented amount due on assumed mortgage); Johnson v. Healy, 176 Conn. 97, 405 A.2d 54, 56-57 (1978)(vendor-builder of home liable to buyer for innocent misrepresentation that nothing was wrong with house).

[51] *See, e.g.*, Brown v. Sims, 22 Ind. App. 317, 53 N.E. 779, 782 (1899)(abstractor liable to third person for defective title abstract on which third person relied); Dickel v. Nashville Abstract Co., 89 Tenn. 431, 14 S.W. 896 (1890)(abstractor liable for omissions in title abstract on which vendee relied in deciding to complete purchase).

[52] *See* Cunningham v. C. R. Pease House Furnishing Co., 69 A. 120, 120 (N.H. 1908)(defendant erroneously represented stove blacking as safe for use on hot stove).

[53] James & Gray, *Misrepresentation — Part I*, 37 Md. L. Rev. 286, 306 (1977). This hesitancy was due to the fear that permitting recovery for economic loss might lead to endless liability for the defendant. *Id.* at 307.

[54] *See* Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441, 448 (1931). In this famous case Judge Cardozo and the New York Court of Appeals rejected the opportunity to expand liability for negligent misrepresentation to those outside privity of contract. The court did suggest that deceit was actionable in such a case. *Ultramares*, 174 N.E. at 446, 448-50. The plaintiff creditor had extended credit to a business after examining a balance sheet certified by defendant accounting firm. *Id.* at 442-43. The court feared that allowing recovery for negligence in this situation would extend the field of liability for negligent misrepresentation so far as to render it almost identical to liability for deceit. *Id.* at 447. The court further expressed concern that if liability were imposed, a thoughtless mistake would expose defendants to liability in an uncertain amount for an uncertain time to an unknown number of people. *Id.* at 444. Other courts continued to require privity as a prerequisite to recovery for economic loss caused by a negligent misrepresentation. *See* Texas Tuneling Co. v. City of Chattanooga, 329 F.2d 402, 407 (6th Cir. 1964)(no liability, in absence of privity, for engineering firm's negligent misrepresentations which were relied upon by subcontractor working on city project).

A landmark case which allowed a plaintiff to recover for economic loss was Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922). In an opinion written by Judge Cardozo,

abolished in cases where the speaker's profession required care.[55]

In 1979 the Mississippi Supreme Court, in *First Money, Inc. v. Frisby*,[56] implicity sanctioned the action of negligent misrepresentation.[57] In *First Money* the defendant allegedly represented that if the

---

the New York Court of Appeals permitted the plaintiff, a buyer of beans, to recover from a public weigher who certified an inaccurate weight on which the buyer relied. *Glanzer*, 135 N.E. at 275. The court noted that the *Glanzer* defendants were not held liable merely for careless words, but for carelessly performing a service. *Id.* at 276. The court stated that the limits of duty were expanded by the defendant's knowledge of the potential use of the information. *Id.*

[55] *See, e.g.*, Rusch Factors, Inc. v. Levin, 284 F. Supp. 85, 90-91 (D.R.I. 1968)(questioned the wisdom of *Ultramares Corp. v. Touche* privity rule; permitted recovery for negligent misrepresentations for those not in privity with speaker). Some courts imposed strict liability in the area of misrepresentation. *See generally* W. PROSSER & W. KEETON, *supra* note 11, at 748-749. One of the earliest strict liability cases dealing with misrepresentation was Holcomb v. Noble, 69 Mich. 396, 37 N.W. 497 (1888), which held that a vendor who misrepresented the quality and value of land was liable for damages to the relying vendee, even though the vendor was innocent of any intent to deceive. *Id.* at 498. In Ham v. Hart, 58 N.M. 550, 273 P.2d 748 (1954), the seller misrepresented the production of a well, stating it would produce two gallons of water per minute when it actually produced only one half gallon per minute. *Id.* at 748. The New Mexico Supreme Court imposed liability despite the good faith of the defendant. *Id.* at 749; *see also* Johnson v. Healy, 176 Conn. 97, 405 A.2d 54, 56 (1978)(strict liability rule for innocent misrepresentation in the sale of goods). It has been suggested that courts may have limited strict liability for misrepresentation to instances in which a vendor-vendee relationship existed. Note, *Torts—Misrepresentation—Strict Liability*, 28 S. CAL. L. REV. 193, 195 (1955). The RESTATEMENT (SECOND) OF TORTS § 552C (1977) would impose strict liability on one who sells to, rents to, or exchanges property with another.

[56] 369 So. 2d 746 (Miss. 1979).

[57] *Id.* at 750. The Second Restatement of Torts recognizes a cause of action for negligent misrepresentation:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. . . .

RESTATEMENT (SECOND) OF TORTS § 552 (1977). The Restatement would also limit liability of the defendant to those for whose benefit he supplies the information. *Id.* The Restatement would grant damages to a successful plaintiff in the amount of the difference in value between what he paid (purchase price) and what he actually received, along with pecuniary loss which was a consequence of reliance on the misrepresentation. *Id.* at § 552B. Some courts have expressly followed the Restatement's definition of negligent misrepresentation. *See* First Nat'l Bank in Lamar v. Collins, 44 Colo. App. 228, 616 P.2d 154, 155 (1980)(quoted § 552 of Restatement in recognizing cause of action for negligent misrepresentation). Other jurisdictions maintained the traditional fraud rules. *See* Marine Midland Bank v. John E. Russo Produce Co., 50 N.Y.2d 31, 405 N.E.2d 205, 211, 427 N.Y.S.2d 961, 968 (1980)(knowing misrepresentation was essential element of cause

plaintiff could purchase a tract of land in a specified area, he could resell the land at a profit within one year.[58] Plaintiff claimed that the defendant assured him that it would provide financing for the purchase of the various lots composing the tract.[59] The defendant subsequently failed to provide financing for the purchase of two parcels of property in the tract.[60] Plaintiff sued, alleging both deceit and negligent misrepresentation.[61] The Mississippi Supreme Court reversed a verdict for the plaintiff,[62] stating that the allegations and proof offered by the plaintiff lacked the necessary specificity to sustain the charges.[63] However, the court implicitly recognized the existence of two separate causes of action, one for fraudulent misrepresentation, or deceit, and one for negligent misrepresentation.[64] The court noted that the basis for damages caused by fraudulent misrepresentation was a lack of honesty, while the basis for damages caused by negligent misrepresentation was a lack of care.[65]

---

of action for fraud). Yet other jurisdictions did not differentiate between negligent and fraudulent misrepresentations. *See* Cameron v. Outdoor Resorts of Am., Inc., 611 F.2d 105, 106 (11th Cir. 1980)(knowledge requirement of common-law fraud satisfied, under Florida law, by negligent misrepresentation made when speaker ought to have known that statement was false); Gen. Ins. Co. of Am. v. Lebowski, 312 Minn. 370, 252 N.W.2d 252, 255 (1977)(negligent misrepresentation held sufficient for a finding of fraud). Some states made negligent misrepresentation actionable under statute. *See* Grenell v. City of Hermosa Beach, 103 Cal. App.3d 864, 871, 163 Cal. Rptr. 315, 319 (1980)(statement made which was not warranted by information of speaker was negligent and actionable under CAL. CIV. CODE § 1572 (West 1954); *see also* Maring-Crawford Motor Co. v. Smith, 233 So. 2d 484, 487 (Ala. 1970)(good faith misrepresentation actionable fraud, if other elements proved, under Alabama statute).

[58] *Frisby*, 369 So. 2d at 749. The defendant spoke of the profitability of purchasing and reselling realty in the area. *Id.*

[59] *Id.*

[60] *Id.* at 749. Plaintiff had previously purchased several lots in the tract. Financing for the purchases was provided by defendant. Plaintiff planned to purchase and resell the entire tract. When plaintiff secured commitments for the purchase of the two final parcels in the tract, the defendant failed to provide the needed financing. *Id.*

[61] *Id.* at 747-49.

[62] *Id.* at 751.

[63] *Id.* The court stated that the negligent misrepresentation allegation was insufficient because it essentially did nothing more than charge deceit in very general terms. *Id.* at 750.

[64] *Id.* at 750. The difference in the deceit test of *Derry v. Peek* and the negligent misrepresentation standard has been described as a subjective test of the defendant's own knowledge, as in *Derry v. Peek*, on the one hand, and the objective test of the reasonable person, in negligent misrepresentation, on the other. Note, *supra* note 55, at 194.

[65] *Frisby*, 369 So. 2d at 750. As support for the distinction, the court cited the RESTATEMENT (SECOND) OF TORTS §§ 549, 552 (1977). *Frisby*, 369 So. 2d at 750. For a discussion of Restatement § 552, see *supra* note 59. Professor Keeton noted that some jurisdic-

In the instant case, the court concluded that when a banking institution chooses to supply credit information to a third party[66] in a context where the banking institution should know that the information will be relied upon,[67] the banking institution has a duty to act with care and diligence in supplying that information.[68] The court noted that the defendant banking institution was in a position to verify the accuracy of the credit information it gave to others and that there was ordinarily no reason for such factual information to be inaccurate.[69] Therefore, since the plaintiff alleged reasonable reliance upon the allegedly false credit information supplied by the banking institution, and damages were a direct consequence thereof, plaintiff was entitled to a judicial determination as to whether the bank was negligent when it collected and supplied the information.[70]

In *Berkline*, the Supreme Court of Mississippi sets forth the ele-

---

tions have permitted an inference of dishonesty where the representer has negligently based his statements on unreliable information. Keeton, *supra* note 30, at 599-600. Such an inference, according to Professor Keeton, meant that the results of misrepresentation suits in jurisdictions where dishonesty was required did not differ much from results in those states where negligence sufficed for recovery. *Id.*

[66] *Berkline*, 453 So. 2d at 702. The court noted that the bank had no duty to provide credit references, but did so as a service to its customers, which allowed the customers to conduct business on credit. *Id.* at 701, 702. The court noted that this was not necessarily a service of unilateral benefit, since the service aided the bank in maintaining the business of the customer. *Id.* Also, the court pointed out that a bank which refused to act as a credit reference was liable to no one. *Id.* at 702.

[67] *Id.* at 701-02. The court noted that the bank was in a unique position to have known of the customer's credit worthiness, and the bank should have known that third parties considered it as being in a position of superior knowledge. *Id.* at 702.

[68] *Id.* at 701-02.

[69] *Id.* For the bank to be liable, the information had to be false at the time the bank gave it, and the giving of false information had to be a product of the bank's negligence. *Id.* The standard of proof in a negligent misrepresentation case is preponderance of the evidence, which is in contrast to the clear and convincing proof required in fraud cases. *Id.* at 703. The court emphasized that a claim of fraudulent misrepresentation was still available in Mississippi, if proved by clear and convincing evidence. *Id.* The court also emphasized the difference between fact and opinion. The information given by the loan officer contained representations of fact. *Id.* at 702. A simple expression of opinion, on the other hand, may not give rise to a cause of action for negligent misrepresentation. *Id.*

[70] *Id.* at 702. The court noted that no prior Mississippi cases had listed the elements of negligent misrepresentation. *Id.* The court also mentioned the theories of promissory estoppel and equitable estoppel as analogous to the rule of detrimental reliance discussed in the instant case. *Id.* For a brief discussion of these two theories, *see supra* note 18. The *Berkline* case was remanded for further proceedings on the negligent misrepresentation claim and was ordered resumed at the point where the circuit judge terminated the action. *Berkline*, 453 So. 2d at 702. The Mississippi Supreme Court made it clear that it expressed no opinion as to the merits of either litigant's case. *Id.* at 703.

ments for the cause of action of negligent misrepresentation[71] which had been implicitly recognized five years earlier.[72] This newer cause of action is added to the centuries' old suit for deceit.[73] The only real difference in the elements of the two lawsuits is that scienter is necessary to sustain an action for deceit,[74] while under the *Berkline* rule negligence will now suffice in certain, as yet not fully defined, situations.[75] Even with the *Berkline* delineation of the elements of negligent misrepresentation, important questions remain. First, the court will surely be called upon to draw a distinction between the "ought to have known" method of establishing scienter[76] in a deceit case and in an act of mere negligence,[77] as in the instant case. This distinction is crucial because if an action is held to lie in deceit, the burden of proof is by clear and convincing evidence,[78] while in a negligent misrepresentation case the burden of proof is by a preponderance of the evidence.[79] If the test in a negligence action is that the reasonable prudent person[80] "ought to know" something, then the elements of the causes of action in deceit and negligence are practically indistinguishable. Another problem the court must eventually address is the extent of liability one has after making the negligent misrepresentation. Although not expressly held in the instant case, the Mississippi Supreme Court may limit liability to those in certain professional positions.[81] It appears that the court has accepted in principle the negligent misrepresentation definition of the Restatement (Second) of Torts,[82] and thus may be inclined to limit liability as per the Restatement.[83] Consequently, any concern that this decision may open the doors of liability for the "average person" is probably unfounded, as the court took care to discuss its decision in the context of information given in a business setting.[84] In effect, the decision merely provides a remedy to those who

---

[71] *See supra* pages 1-2.
[72] *See supra* notes 56-57 and accompanying text.
[73] *See supra* notes 11-19 and accompanying text.
[74] *See supra* notes 20-29 and accompanying text.
[75] *Berkline*, 453 So. 2d at 702.
[76] *See supra* notes 20, 46, 47, and accompanying text.
[77] *See supra* note 57 and Keeton, *supra* notes 30, 65.
[78] *See supra* note 49 and accompanying text.
[79] *Berkline*, 453 So. 2d at 702.
[80] *See supra* note 47.
[81] *See supra* notes 51, 57.
[82] *See supra* note 57.
[83] *See supra* note 57.
[84] *See supra* notes 66-69 and accompanying text.

rely to their detriment upon the professional expertise of another[85] who has acted negligently in supplying important information.

Rick Gibson

[85] *See supra* note 57.

Constitutional Law—Juries—Racially Discriminatory Use of Peremptory Challenges Violates the Sixth Amendment Guarantee of Trial by an Impartial Jury

Defendant,[1] alleging a violation of his constitutional rights under the sixth[2] and fourteenth amendments,[3] filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York.[4] Defendant's petition, which was conditionally granted,[5] followed his robbery conviction by an all-white jury in the New York State Supreme Court.[6] The trial court had denied defendant's motion for a hearing to challenge the state prosecution's allegedly discriminatory use of its peremptory challenges.[7] The district court

---

[1] Defendant was Michael McCray, identified by white complainant Phillip Roberts as on one of three black youths who assaulted and robbed him at gunpoint in Brooklyn on November 15, 1978. McCray v. Abrams, 750 F.2d 1113, 1114-15 (2d Cir. 1984).

[2] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const. amend. VI.

[3] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

[4] McCray v. Abrams, 576 F. Supp. 1244, 1245 (E.D.N.Y. 1983).

[5] *Id.* at 1249. The district court ordered that the state must release defendant unless it afforded him a new trial within 60 days. *Id.*

[6] *McCray*, 750 F.2d at 1115; McCray v. Abrams, 576 F. Supp. 1244, 1245 (E.D.N.Y. 1983). Defendant was sentenced to concurrent prison terms of two to six years on a first degree robbery charge and 1½ to 4½ years on a second degree robbery charge. *McCray*, 750 F.2d at 1115.

[7] People v. McCray, 104 Misc. 2d 782, 429 N.Y.S.2d 158, 159 (N.Y. Sup. Ct., Kings County 1980). With a jury composition of nine whites and three blacks, the first trial resulted in a hung jury. There were three votes for acquittal with either two or three of those votes being by the black jury members. *McCray*, 750 F.2d at 1115. On retrial, during voir dire, defendant moved for a mistrial because the prosecutor, exercising 11 or 12 of the state's 15 peremptory challenges, removed seven black venire persons and one Hispanic venireman. *Id.* Defendant claimed the prosecutor was systematically using peremptory challenges to exclude all blacks and Hispanics from the jury. *Id.* Following defendant's motion, which was denied, one black served as first alternate on the jury. *Id.* at 1118. On appeal, the Appellate Division affirmed the conviction without opinion. People v. McCray, 84 A.D.2d 769, 444 N.Y.S.2d 972 (1981). The New York Court of Appeals affirmed. People v. McCray, 57 N.Y.2d 542, 550, 457 N.Y.S.2d 441, 446, 443 N.E.2d 915, 920 (1982). The four-to-three decision relied on Swain v. Alabama, 380 U.S. 202 (1965). The *Swain* decision, the leading case authority on this issue, addressed the constitutional validity of racially discriminatory use of peremptory jury challenges. *See McCray*, 750

ruled that the sixth amendment required judicial scrutiny of racially discriminatory use of peremptory challenges by the state[8] and set out the procedures that must be followed if such abuse was alleged.[9] The court further held that the equal protection clause of the fourteenth amendment should be construed to prohibit the use of peremptory

---

F.2d at 1118. The three dissenters did not view *Swain* as controlling in light of the sixth amendment guarantee of impartial jury trial. *See* People v. McCray, 57 N.Y.2d 542, 551-59, 457 N.Y.S.2d 441, 446-51, 443 N.E.2d 915, 920-25 (1982)(Meyer, Jones, Fachsberg, JJ., dissenting).

The United States Supreme Court denied defendant's petition for writ of certiorari. McCray v. New York, 461 U.S. 961, 961 (1983)(denying cert. to People v. McCray, 57 N.Y.2d 542, 457 N.Y.S.2d 441, 443 N.E.2d 915 (1982)). An opinion in support of the denial of certiorari by Justice Stevens, joined by Justices Blackmun and Powell, stated that the denial was based on the ground that further consideration by other courts of the substantive and procedural ramifications would enable the Supreme Court "to deal with the issue more wisely at a later date. . . ." Recognizing that peremptory challenges had traditionally been final and unreviewable, the Court indicated that scrutiny of discriminatory use of peremptory challenges was not beyond the scope of judicial review. McCray v. New York, 461 U.S. 961, 962 (1983). However, Justice Stevens explicitly stated that the time for reconsideration by the Supreme Court was not yet ripe, finding it desirable that state courts first serve as laboratories for further study. *Id.* at 963. Justice Marshall, joined by Justice Brennan, wrote a dissenting opinion which also expressed the view that discriminatory exercise of the state's peremptory challenges should not be considered beyond judicial scrutiny, but which disagreed with the delay in reconsideration. Justice Marshall found that the possibility of a violation of defendants' sixth amendment rights made it imperative that the Court reexamine the issue immediately. *Id.* at 969-70 (Marshall, J., dissenting from denial of writ of certiorari). His dissent was grounded in the fact that the apparent controlling case, *Swain*, was decided before the Supreme Court held in Duncan v. Louisiana, 391 U.S. 145, 149 (1968), that the sixth amendment applies to the states through the fourteenth amendment. He urged that *Swain* should therefore be reconsidered in light of the recent sixth amendment cases. McCray v. New York, 461 U.S. 961, 967 (Marshall J., dissenting). Relying on the accompanying Supreme Court opinions, defendant moved for reargument in the New York Court of Appeals, but the motion was denied without opinion. People v. McCray, 60 N.Y.2d 587, 467 N.Y.S.2d 1031, 454 N.E.2d 127 (1983).

[8] McCray v. Abrams, 576 F. Supp. 1244, 1248-49 (E.D.N.Y. 1983); *McCray*, 750 F.2d at 1117.

[9] McCray v. Abrams, 576 F. Supp. 1244, 1249 (E.D.N.Y. 1983); *McCray*, 750 F.2d at 1131-32. When misuse of peremptory challenges by the state was alleged, the court required that the defendant show initially that the group excluded was a cognizable group in the community, and secondly that there was a substantial likelihood that the questioned peremptory challenges had been made on the basis of the venireperson's group affiliation rather than his inability to decide the particular case on the basis of the evidence presented. Next, the prosecution could rebut defendant's prima facie case by showing that racially neutral selection criteria produced the alleged discriminatory result. Finally, if the court found the genuineness of the prosecution's response inadequate, the court must declare a mistrial and a new jury must be selected from a new panel. McCray v. Adams, 576 F. Supp. 1244, 1249 (E.D.N.Y. 1983).

challenges to exclude blacks solely on the basis of race.[10] On appeal to the United States Court of Appeals for the Second Circuit,[11] *held*, affirmed in part,[12] vacated in part,[13] and remanded.[14] Where a defendant makes a prima facie showing that the prosecution, solely on the basis of group affiliation, systematically excluded a cognizable group from the petit jury by use of the state's peremptory challenges, and when the state is unable to rebut defendant's case, the sixth amendment

---

[10] Relying on the Supreme Court opinions accompanying the denial of certiorari, the district court found that Swain v. Alabama, 380 U.S. 202 (1965), was no longer good law. McCray v. Abrams, 576 F. Supp. 1244, 1246-49 (E.D.N.Y. 1983). A new trial was required because of the trial court's failure to inquire into the bases for the prosecutor's use of his peremptory challenges. *Id.* at 1249. The district court denied without comment the state's motion to amend the judgment and expand the record by submission of an affidavit by the prosecutor describing her use of the peremptory challenges. *McCray*, 750 F.2d at 1117-18.

[11] *McCray*, 750 F.2d at 1135. The state appealed the district court's ruling which granted the conditional writ, arguing that defendant failed to establish a prima facie case of racially discriminatory use of peremptory challenges by the state, or in the alternative, that even if defendant did make the prima facie showing, the state should be allowed the opportunity to present rebutting evidence. *Id.* at 1118. The state conceded that the district court correctly held that both the sixth and fourteenth amendments prohibited the use of peremptory challenges to strike potential jurors on the basis of race. *Id.*

[12] *Id.* at 1134-35. The court of appeals affirmed the district court's ruling that defendant had established a prima facie case that the state's racially discriminatory use of the peremptory challenges violated his sixth amendment rights by excluding black and Hispanic prospective jurors on the basis of group affiliation. *Id.*

[13] *Id.* at 1135. The court vacated the order conditionally granting the writ of habeas corpus. *Id.*

[14] *Id.* The court remanded with instructions to the district court to conduct a hearing into the state's proffered rebuttal of the defendant's prima facie case. *Id.*

A request for an en banc reconsideration of the decision was rejected by a majority of the Court of Appeals for the Second Circuit. McCray v. Abrams, 756 F.2d 277, 278 (2d Cir. 1985). While acknowledging the importance of the decision, the concurring opinion found that the lack of adversity between the parties on the central issue did not make it an appropriate case for en banc reconsideration. *Id.* at 278 (Newman, J., concurring). A dissent, joined by two other circuit judges, expressed that a majority opinion of only two judges of a three-judge panel, in a 13-judge circuit, which altered the very nature of peremptory challenges and which would significantly affect all jury selections in that circuit, was deserving of en banc reconsideration. *Id.* (Winter, J., dissenting from denial of rehearing en banc). This dissent suggested that the lack of adversity between the litigants due to the concession by the prosecution that the state may not systematically use peremptory challenges against blacks and Hispanics in the absence of reasons unrelated to race or national origin undermined the precedential value of the entire decision. *Id.* at 279 (Winter, J., dissenting). However, because the three-judge panel independently evaluated the concession made by the state to determine if it was consistent with existing law, the decision would have far-reaching precedential effect which deserved en banc reconsideration. *Id.*

guarantee of trial by an impartial jury requires that the court declare a mistrial and that a new jury be selected from a new panel. *McCray v. Abrams*, 750 F.2d 1113 (1984), *reh'g en banc denied*, 756 F.2d 277 (2d Cir. 1985).

Historically, the exercise of peremptory challenges by government to shape the jury can be traced from the time of William the Conqueror in England.[15] A 1305 statute, eliminating the crown's peremptory challenges for "cause certain,"[16] was nonetheless construed by the English courts to allow the prosecutor to have certain jurors "stand aside" without explanation during the examination.[17] Although the use of peremptory challenges by defendants was adopted in colonial

---

[15] J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 2, 147 (1977). The system of inquests begun by William was expanded during the rule of Henry II (1154-1189) by the practice of impaneling 12 men who took an oath to reveal any man among them believed to be a criminal. *Id.* at 2. The jury was used irratically as the crown's prerogative until the Magna Carta in 1215 guaranteed that no free man would be imprisoned or exiled unless a group of his peers so judged. *Id.* at 3. *See* Swain v. Alabama, 380 U.S. 202, 212-13 (1965)(at early common law, prosecutor had right to challenge any number of jurors without cause; defendant allowed to challenge 35 jurors in felonies). The peremptory challenge was defined and described by Blackstone:

> [I]n criminal cases, . . . there is . . . allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a *peremptory* challenge; a provision full of that tenderness and humanity to prisoners . . . . This is grounded on two reasons: 1. As every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner . . . should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which the prisoner is still at liberty, if he pleases, peremptorily to set him aside.

4 W. BLACKSTONE, COMMENTARIES 353 (reprinted 1978)(emphasis in original). *See generally* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 21.3(d) (1985)(discussing nature and function of peremptory challenges).

[16] *See* Hayes v. Missouri, 120 U.S. 68, 71 (1887)(discussing common-law origins of peremptory challenges; removal of unlimited number of objectionable jurors resulted in juries hand picked by the crown). The English statute attempted to limit juror bias by requiring that challenges for the king be only for "cause certain," accompanied by customary inquiry of the court. The Ordinance for Inquests, 33 Edw. 1, Stat. 4 (1305), *quoted in* J.VAN DYKE, *supra* note 15, at 148 n.b.

[17] Regina v. Frost, 9 Car. & P. 129, 137-38, 173 Eng. Rep. 771, 775 (1839). *See* Swain v. Alabama, 380 U.S. 202, 213 (1965)(interpretation given statute reflected English view that proper jury trial required peremptory challenges on both sides).

America as part of the received common law,[18] uncertainty existed concerning the prosecution's use of peremptory challenges until 1827 when the Supreme Court asserted that the "standing aside" procedure had always been and continued to be a part of the common law.[19]

The United States Supreme Court in 1880 first addressed the issue of discriminatory jury selection in *Strauder v. West Virginia*,[20] twelve years after the adoption of the fourteenth amendment. In *Strauder*, a West Virginia statute, expressly limiting jury service to "all white male persons," was challenged by a Negro convicted of murder and was declared unconstitutional under the fourteenth amendment because it facially discriminated against all blacks and other nonwhites.[21] The Court in *Strauder* noted, however, that a state could prescribe jury qualifications which discriminated so long as the classifications did not violate the fourteenth amendment[22] and thereby impair the right of

---

[18] Swain v. Alabama, 380 U.S. 202, 214-16 (1965). *See* Lewis v. United States, 146 U.S. 370, 376 (1892)(declaration that right of peremptory challenge came from common law with trial by jury and was essential to fairness of jury trials).

[19] United States v. Marchant, 25 U.S. (12 Wheat.) 480, 483 (1827). Congress in the Crimes Act of 1790 set the number of peremptory challenges for federal defendants. Crimes Act of 1790, ch. 9, § 30, 1 Stat. 119 (1790). Because the government's right to stand aside was not incorporated in the statutes for defendants, an Act of July 20, 1840, ch. 47, 5 Stat. 394 (1840), was enacted which allowed federal courts to adopt existing state practice in jury selection. United States v. Shackelford, 59 U.S. (18 Howard) 588, 589-90 (1856).

The federal jury selection process evolved into the random selection of the venire from a master wheel, which was a compilation of lists of registered voters for the district. The Federal Jury Selection and Service Act of 1968. 28 U.S.C. §§ 1861-74 (1976). Seven steps described federal voir dire and juror challenge practices: (1) after the venire entered the courtroom and the clerk had administered the *oath to veniremen*, the panel to be examined was selected by a random draw of names by the clerk; (2) the judge addressed the panel explaining the voir dire, the challenge practice, and the nature of the case; (3) voir dire examination ensued; (4) counsel exercised challenges for cause; (5) counsel exercised peremptory challenges; (6) alternate jurors were chosen; (7) the judge asked counsel if the jury was acceptable as constituted; the clerk administered the *oath to jurors*. Bermant, *Jury Selection Procedures in United States District Courts*, Federal Judicial Center (June 1982)(emphasis in original). *See generally* Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 339-42 (1982)(role of peremptory challenge); Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 549-58 (1975)(functions of cause and peremptory challenges).

[20] 100 U.S. 303 (1880).

[21] *Id.* at 305, 308.

[22] *Id.* at 310. "[The state] may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications." *Id.* *But see* Thomas v. Texas, 212 U.S. 278, 282-83 (1909)(refusal to find intentional state discrimination against blacks, deferring to state court's "factual" determination based on

the "colored race" to immunity "from unfriendly legislation against them distinctively as colored . . . ."[23] The jury cases reaching the Supreme Court after *Strauder* involved challenges based on discriminatory composition of the grand jury or jury venire.[24]

In 1965, the Court reaffirmed in *Swain v. Alabama*[25] the unconstitutionality of a state's "purposeful or deliberate denial" to Negroes or any other identifiable group of their right to participate as jurors by exclusion from the prospective juror pool.[26] The Court, however, re-

---

state's explanation). *Contra* Norris v. Alabama, 294 U.S. 587, 595-99 (1935)(finding intentional state discrimination against blacks, regardless of state court's "factual" determination). The Court in *Norris* for the first time stated that once the defendant established a "prima facie case" of discrimination by showing total exclusion of blacks from the venire, the burden of proof shifted to the prosecution to explain the discriminatory result. *Id.* at 598. This requirement became known as the "rule of exclusion." *Swain*, 380 U.S. 202, 240 (1965); Note, *Constitutional Law—The Prosecutor's Use of the Peremptory Challenge to Effect the Racial Composition of Juries—Sixth and Fourteenth Amendment Implications*, 50 TENN. L. REV. 385, 388 (1983). *See* Hunter v. Underwood, 105 S. Ct. 1916, 1922 (1985)(statute enacted for the purpose of discriminating against blacks violated equal protection); Mt. Healthy City School Dist. Bd. of Ed. v. Doyle, 429 U.S. 274, 285 (1977)(discriminatory purpose present but not determinative); Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264-65 (1977)(requirement that discriminatory purpose be proved in addition to discriminatory effect in order to establish fourteenth amendment equal protection violation); Washington v. Davis, 426 U.S. 229, 239 (1976)(discriminatory impact alone was not sufficient to prove invidious discrimination in violation of fourteenth amendment).

Some jury selection decisions indicate, however, that a statistical underrepresentation combined with an "opportunity to discriminate" may be sufficient to constitute a prima facie case of "purposeful" discrimination. *See, e.g.*, Whitus v. Georgia, 385 U.S. 545, 551-52 (1967)(prima facie case established by statistical evidence with opportunity to discriminate in revision of jury list); Blackwell v. Thomas, 476 F.2d 443, 444 (4th Cir. 1973)(statistical disparity coinciding with opportunity to discriminate established prima facie case).

[23] *Strauder*, 100 U.S. at 308. The issue of racial exclusion was delineated by the *Strauder* court:

> It is to be observed that the first of these questions is not whether a colored man . . . has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color; but it is whether in the composition or selection of jurors, . . . all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury.

Id. at 305.

[24] *See, e.g.*, Hernandez v. Texas, 347 U.S. 475, 478-80 (1954)(recognition of Hispanic Americans as cognizable class); Glasser v. United States, 315 U.S. 60, 86 (1942)(use of term "cross section of the community" in reference to jury venire).

[25] 380 U.S. 202 (1965).

[26] *Swain*, 380 U.S. at 203-05. Defendant, a 19-year old Negro male, was convicted of the rape of a 17-year old white female and sentenced to death in Talladega, Alabama, by

jected the defendant's equal protection challenge that the prosecution's removal of all Negroes from the jury panel by use of its peremptory challenges during voir dire was unconstitutional.[27] Two distinct motives were delineated by the Court for the prosecution's use of peremptory challenges: (1) the use of race for the purpose of identifying suspected bias related to the particular case,[28] and (2) the use of race for the purpose of denying all Negroes the opportunity of ever serving on a jury.[29] The first use for identification of case-related bias was valid,[30] while the second use for racial discrimination[31] was improper

---

an all-white jury from which six Negroes had been struck by the prosecution. *Id.* at 203, 210, 231. *See* J. VAN DYKE, *supra* note 15, at 56-58, 150-51 (discussion of law and facts in *Swain*). Focusing on the composition of the pool from which the Talladega County venire was drawn, the Court found that the selection of prospective jurors was "haphazard" but held that an imperfect system was not synonymous with purposeful discrimination based on race. *Swain*, 380 U.S. at 209.

[27] *Swain*, 380 U.S. at 222. Defendant's challenge was based solely on the equal protection clause of the fourteenth amendment because the sixth amendment did not yet apply to the states. *Id.* at 210-11. The sixth amendment was later held to apply to the states in Duncan v. Louisiana, 391 U.S. 145, 149 (1968); *see infra* notes 38-39 (discussion of *Duncan*).

Alabama's jury system provided for peremptory strikes, a substitute for peremptory challenges. *Swain*, 380 U.S. at 217. In what was called a "struck jury system," the judge conducted the voir dire of the entire panel, excusing members who were exempt or subject to challenge for cause. In alternate turns, the defense attorney struck two veniremen and the prosecution one until 12 jurors remained. *Id.* at 210, 218. *See* Note, *supra* note 22, at 389 n.37 (description of struck jury system).

[28] *Swain*, 380 U.S. at 222; *see* Saltzburg & Powers, *supra* note 19, at 345 (racially based peremptory challenge used to identify and remove suspected case-related bias explicitly approved by all justices except Justice Black who concurred in result without opinion).

[29] *Swain*, 380 U.S. at 224. Justice Harlan emphasized, however, that he understood that the Court reserved and did not decide the question presented in Part III of the opinion which dealt with the use of peremptory challenges for the purpose of keeping Negroes from ever serving on juries. *Id.* at 228 (Harlan, J., concurring).

[30] *Id.* at 220. The Court reasoned that the question that both the prosecutor and the defense counsel must decide was not whether a juror of a particular race or group would be partial, but whether a juror from a different group would be less likely to be partial. *Id.* at 221. Peremptory challenges of necessity were exercised based on limited knowledge of the individual, which would include his group affiliation. *Id. See* United States v. Leslie, 759 F.2d 381, 392 (5th Cir. 1985)(Garwood, J., dissenting in separate opinion)(use of peremptory challenge reflected tactical judgment by one side's attorney under facts of particular case being tried).

[31] *Swain*, 380 U.S. at 223-24. The Court found that the record did not contain sufficient proof by the defendant to establish systematic exclusion of Negroes for reasons wholly unrelated to the case. *Id.* However, the Court noted that the peremptory challenge was not designed to "facilitate or justify" such a purpose. *Id.* The two-purpose use of peremptory challenges was discussed in Saltzburg & Powers, *supra* note 19, at 342-46;

and could be proved by the defendant's showing that the prosecution in a given jurisdiction had systematically excluded all blacks over a long period of time.[32] The Court reasoned that ultimate responsibility for the resulting composition of the petit jury selected from the jury panel rested with both the prosecution and the defense.[33] The Court held that the nature and function of the peremptory challenge in securing an impartial jury permits insulation from scrutiny of the prosecutor's reasons for exercise of peremptory challenges in any particular case.[34] The Court further held that the presumption must be that the prosecutor was "using the State's challenges to obtain a fair and impartial jury."[35] For a number of years following the *Swain* decision, no

---

W. LaFave & J. Israel, *supra* note 15, at 848.

[32] *Swain*, 380 U.S. at 223. The Court found that to prove an equal protection violation the defendant must show that the prosecutor in a county in case after case, regardless of the fact of the particular case, was responsible for the removal of Negroes who had been selected as qualified jurors and who had survived challenges for cause, with the result that no Negroes ever served on petit juries. *Id.*

[33] *Id.* at 227. Because of a greater number of peremptory challenges, defense counsel usually played a more significant role in arriving at the final jury composition than the prosecution. *Id.*

[34] *Id.* at 222-23, 227. The majority stated that the peremptory challenge was to be exercised "without a reason stated, without inquiry, and without being subject to the court's control." *Id.* at 220. The three dissenting Justices expressed the view that the defendant had in fact established a prima facie case of systematic exclusion of the second, not-trial-related kind and that the majority's opinion violated the principles set forth in *Strauder*. *Id.* at 245-46 (Goldberg, J., dissenting, joined by Warren, C.J., Douglas, J.) The dispute concerned the quantum of historical proof of the state's discriminatory use of peremptory challenges necessary to meet the *Swain* test. *Id.* at 245-46; Jorgenson, *Back to the Laboratory with Peremptory Challenges: A Florida Response*, 12 Fla. St. U.L. Rev. 559, 564 (1984). *See* Note, *Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 Miss. L.J. 157, 158, 164-65 (1967)(contemporaneous evaluation of *Swain*, contending that conflict between peremptory challenge and impartial jury right would result in limitations on use of peremptory challenges).

[35] *Swain*, 380 U.S. at 222; *see* United States v. Leslie, 759 F.2d 366, 374 (5th Cir.)(state's racially-based use of peremptory challenges subjected to judicial scrutiny) *reh'g en banc granted*, 761 F.2d 195 (5th Cir. 1985); United States v. Leslie, 759 F.2d 381, 383-87 (5th Cir.)(Garwood, J., dissenting)(argument that exercise of peremptory challenges based on any trial-related criteria did not violate defendant's rights), *reh'g en banc granted*, 761 F.2d 195 (5th Cir. 1985). In *Leslie*, a black defendant was convicted of possessing and conspiring to distribute narcotics by an all-white jury from which six black veniremen and one black alternate had been removed by the prosecution's exercise of peremptory challenges. *Leslie*, 759 F.2d at 369. The defendant successfully appealed the district court's refusal to invoke its supervisory powers (applicable in a federal violation) to ensure that federal prosecutors did not exercise their peremptory challenges for unjustifiable, racially discriminatory reasons. *Id.* at 370-74. The case was remanded to district court for a hearing to determine the prosecutor's reasons for peremptorily remov-

defendant successfully made the necessary showing of systematic exclusion over a long period of time.[36]

Three years after the *Swain* decision, the Court held in *Duncan v. Louisiana*[37] that the sixth amendment right to an impartial jury trial applied to state actions by "incorporation" in the due process clause of the fourteenth amendment.[38] The Court in *Duncan* left unresolved whether the representative-cross-section requirement was an essential element of the sixth amendment.[39] The meaning of impartial jury under the sixth amendment was clarified, however, in the Court's 1975 holding in *Taylor v. Louisiana*,[40] which required that the jury venire be selected from a representative cross section of the community.[41] The

---

ing all blacks. *Id.* at 374. Judge Garwood's lengthy dissent recognized that the majority did not rest its decision on constitutional grounds; however, he expressed his belief that while supervisory powers rather than constitutional grounds were named, the majority's decision was in fact a constitutional analysis and holding. *Id.* at 399 (Garwood, J., dissenting). Judge Garwood's analysis of the *Swain* decision required him to conclude that group-based peremptory challenges used for the purpose of identifying suspected bias related to the particular case were constitutional, both under the equal protection clause and the sixth amendment. *Id.*

[36] *See* United States v. Nelson, 529 F.2d 40, 43 (8th Cir.)(allegations of prosecutor's misuse supported by statistical evidence viewed with concern, but presumption of propriety not overcome) *cert. denied*, 426 U.S. 922 (1976); Ridley v. State, 475 S.W.2d 769, 772 (Tex. Crim. App. 1972)(testimony by several lawyers and one prosecutor of continuous and routine removal of blacks by peremptory challenge insufficient to meet *Swain* test). *But cf.* United States v. Childress, 715 F.2d 1313, 1316 (8th Cir. 1983)(review of *Swain* challenges revealed two successful defendants who used same statistical evidence to establish "systematic exclusion over a period of time"), *cert. denied*, 104 S. Ct. 744 (1984); *see* State v. Washington, 375 So. 2d 1162, 1165 (La. 1979)(successful challenge of *Swain* standard); State v. Brown, 371 So. 2d 751, 754 (La. 1979)(same).

[37] 391 U.S. 145 (1968).

[38] *Id.* at 149. Defendant, a 19-year-old Negro convicted of a misdemeanor following a bench trial, had requested a jury trial which was denied because state law did not so provide. The Court held that "the Fourteenth Amendment guarantee[d] a right of jury trial in all criminal cases which—were they to be tried in federal court—would come within the Sixth Amendment's guarantee." *Id.*

[39] Note, *supra* note 22, at 391-92. The Court first recognized the representative-cross-section requirement in Smith v. Texas, 311 U.S. 128 (1940). Note, *supra* note 22, at 391. *See Smith*, 311 U.S. at 130 (1940)(in accord with basic concepts of representative government, jury must be body truly representative of community since it is instrument of public justice).

[40] 419 U.S. 522 (1975).

[41] *Id.* at 527. In *Taylor*, a male defendant, convicted of aggravated kidnapping and sentenced to death, challenged the exclusion of women from the petit jury venire. *Id.* at 524. The Court stated that the inquiry was "whether the presence of a fair cross section of the community on venires, panels, or lists from which petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions." *Id.* at 526.

Court in *Taylor* found that the fair-cross-section requirement was "fundamental" to the guarantee of an impartial jury and was necessary in order for the jury to fulfill its "prophylactic" purpose of guarding against the arbitrary use of power by the prosecutor or the judge.[42]

Some courts[43] and commentators[44] suggested that peremptory challenges exercised solely on the basis of race, even though purportedly to identify suspected bias in a particular case, violated *Taylor*'s fair-cross-section requirement.[45] The added sixth amendment protec-

---

Bearing in mind that Justice White wrote all three opinions—*Swain* in 1965 (6-3 decision), *Duncan* in 1968 (7-2 decision), and *Taylor* in 1975 (7-1-1 decision)—the holding in *Taylor* concluded: "The unmistakable import of this Court's opinions, at least since 1940, *Smith v. Texas* . . . and not repudiated by intervening decisions, is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." *Id.* at 528. *See* United States v. Leslie, 759 F.2d 381, 389 n.14 (5th Cir.)(Garwood, J., dissenting)(notation of Justice White's authorship of both *Swain* and *Taylor*), *reh'g en banc granted*, 761 F.2d 195 (5th Cir. 1985).

[42] *Taylor*, 419 U.S. at 530.

[43] *See, e.g.*, United States v. Leslie, 759 F.2d 366, 374 (5th Cir. 1985)(adoption of rationale that all racially-based peremptory challenges violated fair-cross-section requirement); People v. Payne, 99 Ill. 2d 135, 155, 457 N.E.2d 1202, 1212 (1983)(Simon, J., dissenting)(all racially-based peremptory challenges violated state constitution's guarantee of fair-cross-section), *cert. denied*, 105 S. Ct. 447 (1984); State v. Eames, 365 So. 2d 1361, 1364, 1370-72 (La. 1978)(Dennis, J., concurring)(same); People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739, 752 (N.Y. App. Div. 1981)(same); Commonwealth v. Martin, 461 Pa. 289, 336 A.2d 290, 295 (1975)(Nix, J., dissenting)(same).

[44] *See, e.g.*, Brown, McGuire & Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. 192, 234-35 (1978)(contention that abuse of prosecutor's peremptory challenges should result in loss of challenge); Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 13-20 (1982)(analysis of *Swain's* effect on removal of "scrupled" jurors in capital cases); Note, *supra* note 34, at 158, 165 (conflict in two maxims would result in limitation on peremptory challenges); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1738-40 (1977)(position that representative-cross-section requirement should be extended to peremptory challenge stage)[hereinafter cited as Note, *Limiting the Peremptory Challenge*].

[45] *See Taylor*, 419 U.S. at 530. The Court explicitly emphasized that it was not imposing the "requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population," but rather was only requiring that the pools from which juries were drawn must not systematically exclude distinctive groups in the community and thus fail to be "reasonably representative." *Id.* at 538. In the dissenting opinion, Justice Rehnquist criticized the holding as unnecessary and stated that it "smack[ed] more of mysticism than of law" because the majority failed to explain why the Constitution that required distinctive groups not be excluded in jury pools allowed their exclusion in any given petit jury. *Id.* at 541-42 (Rehnquist, J., dissenting).

tion of "impartial" jury trial required definition and parameters which *Taylor* did not clearly provide.[46] Even though *Taylor* was perceived by some courts as superceding *Swain* and thus requiring a different standard,[47] the majority of federal and state courts continued to apply the standard enunciated in *Swain*.[48]

One commentator explained that several factors contributed to the Court's refusal to extend the cross-section rule to a petit jury: (1) random selection may result in under- or overrepresentation of particular groups on a venire and, also, removal for cause may result in the absence of a distinctive group; and (2) a requirement that all distinctive groups must be represented on the petit jury would of necessity create the affirmative selection of the jury, creating a greater opportunity for manipulation and abuse than exists under the current system of rejection of particular jurors from a randomly-drawn venire. Saltzburg & Powers, *supra* note 19, at 347 n.47; *see* Hayes v. Missouri, 120 U.S. 68, 71 (1887)(statement that right to challenge is "right to reject, not to select a juror"); Note, *Limiting the Peremptory Challenge*, *supra* note 44, at 1732 (assignment of juror as representative of specific groups might accentuate identifiable differences among jurors).

[46] J. VAN DYKE, *supra* note 15, at 75. On one level, the Court held that the impartial juror is the individual who would be able to decide the case based solely on the evidence the law deems relevant in the given case, free of any bias. Hayes v. Missouri, 120 U.S. 68, 70 (1887). *See* United States v. Leslie, 759 F.2d 381, 395 (5th Cir.)(Garwood, J., dissenting)(constitutional standard for impartial juror was ability to lay aside opinion and render verdict based on evidence presented), *reh'g en banc granted*, 761 F.2d 195 (5th Cir. 1985); *see also* Wainwright v. Witt, 105 S. Ct. 844, 852 (1985)(held that state in capital cases may exclude for cause "scrupled" jurors unable to follow court's instructions and defined impartial juror as one who would conscientiously apply law and find facts).

On another level, impartiality involved a sense of broad community participation in the jury decision process. *Taylor*, 419 U.S. at 530. Realizing that all persons, jurors included, had biases and opinions that influenced perceptions, the Court required by the fair-cross-section rule that there be a counterbalancing of the range of biases and experiences in the makeup of any given jury pool. Peters v. Kiff, 407 U.S. 493, 503-04 (1972). *See* Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge*, 92 HARV. L. REV. 1770, 1777 (1979)(statement of Supreme Court reasoning that diversity of perspectives would result in general impartiality); *cf.* Note, *Peremptory Challenges and the Meaning of Jury Representation*, 89 YALE L.J. 1177, 1190 (1980)(argument that "mean verdict impact" of jury must match that of society as whole to be impartial)[hereinafter cited as Note, *Meaning of Jury Representation*].

[47] *See supra* notes 37-43 and accompanying text.

[48] *See, e.g.*, Dillard v. Blackburn, 780 F.2d 509, 512 n.2 (5th Cir. 1986) (upholding *Swain* standard and noting en banc review of United States v. Leslie, 759 F.2d 366, *reh'g en banc granted*, 761 F.2d 195 (5th Cir. 1985), held September 1985); United States v. Grandison, 780 F.2d 425, 430-31 (4th Cir. 1985) (*Swain* standard controlling but reassessment by Supreme Court in Batson v. Kentucky, 84-SC-733-MR (Ky. Dec. 20, 1984) (unpublished), *cert. granted*, 105 S.Ct. 2111 (1985), *arg'd* 54 U.S.L.W. 3445, (U.S. Dec. 11, 1985)(No. 84-6263)); United States v. Campbell, 766 F.2d 26, 27 (1st Cir. 1985) (no abuse of peremptory challenges by *Swain* standard); United States v. Brown, 770 F.2d 912, 914 (10th Cir. 1985)(upholding *Swain* standard); Jordan v. Lippman, 763 F.2d 1265,

In 1978, however, the California Supreme Court in *People v. Wheeler*[49] reasoned that if the interaction of diverse beliefs and values produced impartiality in the jury venire, then "group-bias" removal of jurors, even when case-related, would presumptively destroy that impartiality.[50] Relying on its state constitution,[51] the California Supreme Court concluded that removal of prospective jurors on the sole basis of group bias, even in a single trial, violated the right to trial by a jury drawn from a representative cross section of the community.[52] The

---

1282-83 (11th Cir. 1985)(noting *Swain* standard under review by Supreme Court); United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984)(challenge by white defendant of prosecutor's removal of all blacks not sufficient under *Swain*); United States v. Thompson, 730 F.2d 82, 85 (8th Cir.)(prosecutor's challenges of blacks based on race affinity sanctioned by *Swain*), *cert. denied*, 105 S. Ct. 443 (1984); United States v. Newman, 549 F.2d 240, 249 (2d Cir. 1977)(proper peremptory challenges under *Swain*); United States v. Carter, 528 F.2d 844, 850 (8th Cir. 1975)(reaffirmation of *Swain* holding that race or other group affiliation was legitimate ground for peremptory challenge in individual case), *cert. denied*, 425 U.S. 961 (1976); Commonwealth v. Henderson, 497 Pa. 23, 438 A.2d 951, 953 (1981)(race, creed, sex or any other characteristic was valid consideration under *Swain*); State v. Grady, 93 Wis. 2d 1, 286 N.W.2d 607, 611 8Wis. Ct. App. 1979)(assertion that *Swain* held race was appropriate basis for exercise of peremptory challenges).

The Supreme Court has not explicitly reaffirmed *Swain* or addressed the issue of the perceived conflict. Gilliard v. Mississippi, 104 S. Ct. 40, 41 (1983)(Marshall, J., dissenting from denial of certiorari). Justice Marshall expressed his objection to *Swain* and urged immediate review by the Court rather than allowing the states to serve as laboratories to experiment with possible solutions. *Id.* at 41-42. He noted that since the decisions in People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), and Commonwealth v. Soares, 377 Mass. 461, 387 N.E. 2d 499, *cert. denied*, 444 U.S. 881 (1978), 19 jurisdictions had considered the issue and reaffirmed *Swain*. *Gilliard*, 104 S. Ct. at 43 (Marshall, J., dissenting).

[49] 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

[50] *Wheeler*, 583 P.2d at 761, 148 Cal. Rptr. at 902. Four justices concurred in the result and opinion of *Wheeler*, one justice, in a separate opinion, concurred in the result only, and two justices dissented. *Id.* at 748, 148 Cal. Rptr. at 890. Black defendants Wheeler and Willis appealed from convictions by an all-white jury of murder which occurred in the course of a robbery. *Id.* at 752, 148 Cal. Rptr. at 893. The prosecutor had removed all blacks by use of his peremptory challenges. *Id.*

"Group bias" was defined by the court as the presumption by a party that certain jurors were biased solely because of membership in a group identifiable on racial, religious, ethnic, or other grounds. *Id.* at 761, 148 Cal. Rptr. at 902. *See generally* Note, *Peremptory Challenge in Transition*, 5 PACE L. REV. 185, 209-10 (1984)(conclusion that *Wheeler* provided flexible, workable standards and prevented discriminatory abuse).

[51] *See* CALIF. CONST. CODE art. 1, § 16 (as amended 1980)(West 1983).

[52] *Wheeler*, 583 P.2d at 761-62, 148 Cal. Rptr. at 903. While stipulating that the holding did not entitle a litigant to a jury which mirrored the demographic composition of the population, the court expressly stated that the party was constitutionally entitled to a petit jury "as near an approximation of the ideal cross section of the community as

Wheeler court established a less stringent standard than *Swain*; under *Wheeler*, the defendant could prove systematic exclusion of all or nearly all of a cognizable group on the basis of a single voir dire.[53] California opted to provide more protection for its citizens than was provided by existing law.[54]

The following year, the Supreme Court in *Duren v. Missouri*[55] clarified and reaffirmed its holding that "petit juries must be drawn from a source fairly representative of the community," but that the requirement did not mean the petit jury actually chosen must mirror the community.[56] The Court established the test for a defendant's

---

the process of the random draw permit[ted]." *Id.* at 762, 148 Cal. Rptr. at 903.

[53] Winick, *supra* note 44, at 12. The procedure to establish a prima facie case was outlined by the court. *Wheeler*, 583 P.2d at 764, 148 Cal. Rptr. at 905. A rebuttable presumption that the party's use of his peremptory challenges was valid existed, but could be overcome by the other party's showing (1) the complete record of the proceedings and circumstances; (2) the persons excluded were members of a cognizable group within the meaning of the representative-cross-section rule; (3) there was a "strong likelihood" that the excluded persons were being challenged because of their group association rather than because of individual or specific bias. *Id.* at 764, 148 Cal. Rptr. at 905. If the court determined that defendant's prima facie case was made out, the burden shifted to the other party to show the peremptory challenges were not based solely on group bias; the showing need not reach the level required by a challenge for cause. *Id.* at 764-65, 148 Cal. Rptr. at 906. If the questioned peremptory challenges could not be justified, the presumption of their validity was rebutted and a new venire and new petit jury must be selected. *Id.* at 765, 148 Cal. Rptr. at 906.

The court's analysis permitted peremptory challenges for the purpose of removing only jurors who held "specific biases" which concerned the particular case of parties and witnesses in the case. *Id.* at 761, 148 Cal. Rptr. at 902. The party claiming abuse of peremptory challenges could present evidence indicating (1) the other party had struck most or all of the numbers of a identifiable group or used a disproportionate number of his peremptory challenges against that group; (2) the jurors removed were a heterogeneous group in all other respects; (3) voir dire was perfunctory or no questions were asked at all; (4) the victim was a member of the majority while defendant was a member of an identifiable group. *Id.* at 764, 148 Cal. Rptr. at 905-06; *see* Note, *supra* note 50, at 195 (factors significant in proving discrimination). The prosecutor and defendant were both subject to the limitation. *See Wheeler*, 583 P.2d at 764, 148 Cal. Rptr. at 905-06. The California court relied on Note, *Limiting the Peremptory Challenge*, *supra* note 44, in creating the remedy. *See* Saltzburg & Powers, *supra* note 19, at 349 n.56 (California court borrowed from proposals by J. Van Dyke and Note, *Limiting the Peremptory Challenge*; both parties to receive protection of judicial scrutiny).

[54] *Wheeler*, 583 P.2d at 767-68, 148 Cal. Rptr. at 909-10. The California Supreme Court recognized that if the issue of abuse of peremptory challenges were before the United States Supreme Court, the Court would probably reaffirm *Swain*. *Id.* at 767, 148 Cal. Rptr. at 908.

[55] 439 U.S. 357 (1979).

[56] *Id.* at 363-64 (quoting *Taylor*, 419 U.S. at 538). Justice White wrote the eight-to-one opinion in this jury venire case which involved underrepresentation of women.

prima facie challenge of the fair-cross-section requirement[57] and stated firmly that advancement of a "significant state interest," as opposed to "merely rational grounds," must be shown to justify the discriminatory group exclusion being practiced.[58] The sole dissenter, Justice Rehnquist, argued that the basis for the majority's opinion was in reality the equal protection clause rather than the sixth amendment.[59] Analyzing the sixth amendment fair-cross-section requirement, he reasoned that if there were some mystical interaction of "unknowable" qualities of human nature, experiences, and flavors creating impartiality which was constitutionally mandated for jury pools, then that same constitutional

---

Duren, 439 U.S. 358, 360-62. Although he alleged that the jury which convicted him was not a fair cross section of the community by virtue of a state statute which allowed exemption of women, the defendant was convicted of first-degree murder and first-degree robbery by a jury consisting of all males. *Id.* at 360-63. The Court suggested that the Missouri Supreme Court had "misconceived the nature of the fair-cross-section inquiry set forth in *Taylor*," because of the Missouri court's holding that defendant's statistical data did not reflect an unconstitutional underrepresentation of women on the jury venire. *Id.* at 363. The Court found that a 14.5% representation on the jury venire compared to a 54% representation of women in the community was not a "reasonable representation" and that this underrepresentation was due to the system used by the state in the jury selection process. *Id.* at 362.

[57] *Duren*, 439 U.S. at 364. The Court stated that *Duren* test as follows:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id.

[58] *Id.* at 367-68. The Court distinguished the nature of evidence required to prove an equal protection violation involving jury selection/composition from a sixth amendment fair-cross-section violation. *Id.* at 368 n.26. The Court stated that in prior cases an equal protection challenge included not only proof of "disciminatory effect," a significant discrepancy shown by statistics, but also the essential element of "discriminatory purpose." *Id.*

The equal protection claim could be rebutted by the state's proof of lack of discriminatory purpose or, if discriminatory purpose was present, some other valid state interest proving that the discriminatory purpose was not determinative in causing the infringement. *Id.*; *see* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285 (1977)(discriminatory purpose not determinative of action taken); *see also supra* note 22. In contrast, a sixth amendment fair-cross-section challenge required only proof of systematic disproportion to establish infringement of defendant's rights. The rebuttal by the state must prove "adequate justification" for the infringement by showing that attainment of a fair cross section would be incompatible with a significant state interest. *Duren*, 439 U.S. at 368 n.26.

[59] *Duren*, 439 U.S. at 370-71 & n.* (Rehnquist, J., dissenting).

mandate must also apply to the final petit jury.[60]

A few months after the *Duren* decision, the Supreme Judicial Court of Massachusetts, in *Commonwealth v. Soares*,[61] relied on the *Wheeler* court's approach in analyzing the alleged misuse of the state's peremptory challenges.[62] The *Soares* court, like the California court, found support for the decision in its state constitution.[63] The Massachusetts court held that the "exercise of peremptory challenges to exclude members of discrete groups,[64] solely on the basis of bias presumed to derive from that individual's membership in that group," was

---

[60] *Id.* (Rehnquist, J., dissenting). Justice Rehnquist stated, "If impartiality is not lost because a particular class or group represented in the community is *underrepresented* on the petit jury, it is certainly not lost because the class or group is *underrepresented* on the jury venire." *Id.* at 373 n.* (emphasis in original). He pointed out that by the majority's fair-cross-section analysis, if women were in fact underrepresented on the county's jury venire, and the defendant had had a jury of all women instead of all males, he would be entitled to a reversal of his conviction. *Id.*; *see* Note, *Meaning of Jury Representation*, *supra* note 46, at 1182 n.25 (statement that Justice Rehnquist's argument was premised on belief that purpose of cross-sectional pools was to provide cross-sectional juries).

[61] 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 881 (1979).

[62] *See Soares*, 387 N.E.2d at 510 n.12. Four justices concurred in the result and opinion of *Soares*; three justices concurred in the result with a separate opinion. *Id.* at 499. Three defendants, convicted of first-degree murder and sentenced to life imprisonment, claimed that the prosecutor misused peremptory challenges by removing 12 of 13 black veniremen. *Id.* at 508. The rationale of the *Soares* court in overturning the convictions was stated in this manner: "It is not enough . . . that there be a representative venire or panel. The desired interaction of a cross section of the community does not occur there; it is only effectuated within the jury room itself." *Id.* at 513.

[63] *Id.* at 515-16. The court reasoned that article 12 of the Declaration of Rights of the Massachusetts Constitution proscribed the use of peremptory challenges to exclude jurors based solely on their affiliation with a defined group in the community. *Soares*, 387 N.E.2d at 515. *See* MASS. GEN. LAWS ANN. Const. pt. 1, art. 12 (West 1978).

[64] *Soares*, 387 N.E.2d at 516. The court defined discrete groups as those based on sex, race, color, creed or national origin. *Id.* In many jurisdictions the parameters of discrete or cognizable groups remain unclear. *See, e.g., Duren*, 439 U.S. at 377 (1979)(Rehnquist, J., dissenting)(occupation-based classifications may also have to be abandoned by state); La Roche v. Perrin, 718 F.2d 500, 504 (1st Cir. 1983)(prohibition of systematic exclusion of young adults as cognizable group in jury selection process); Brown v. Harris, 666 F.2d 782, 783-84 (2nd Cir. 1981)(no evidence that 21-28 year olds shared any cohesive characteristics making exclusion of that age group from jury venire unconstitutional), *cert. denied*, 456 U.S. 948 (1982); Commonwealth v. Bastarache, 382 Mass. 86, 414 N.E.2d 984, 992 (1980)(distinguishing between "identifiable" and "distinctive" group for age classifications); Note, *Limiting the Peremptory Challenge*, *supra* note 44, at 1735-38 (definition of sixth amendment "cognizable groups"). *See generally* Note, *Constitutional Law—Sixth Amendment Right to Jury Trial Prohibits Systematic Exclusion of Young People in Jury Selection Process*, 18 SUFFOLK L. REV. 512, 515-16 (1984)(discussion of "cognizable groups" recognized by Supreme Court).

in violation of the Declaration of Rights of the Massachusetts Constitution.[65] The court in *Soares* stated that it sought to strike a balance between "the goal of diffused impartiality in the petit jury and the limitations inherent in a feasible and fair process of jury selection" by preserving the use of peremptory challenges where the prospective juror's unique relationship to the particular case raised the possibility of individual bias.[66]

---

[65] *Soares*, 387 N.E.2d at 516; *see* MASS. GEN. LAWS ANN. Const., pt. 1, art. 12 (West 1978)(as amended 1980)(guaranteeing defendant's right to jury of his peers).

Two state courts, based on their state constitutions, followed California and Massachusetts in limiting the prosecutor's use of peremptory challenges by forbidding its exercise solely on the basis of group affiliation. *See* State v. Neil, 457 So. 2d 481, 486-87 & n.10 (Fla. 1984)(prohibition of solely racially-based use of peremptory challenges; stipulation that exclusion of a number of blacks by itself was insufficient to trigger an inquiry); State v. Crespin, 94 N.M. 486, 612 P.2d 716, 718 (1980)(holding that where number of peremptory challenges used was high, *Wheeler-Soares* rationale could be used to show improper systematic exclusion of jurors). *See also* Jorgenson, *supra* note 34, at 568-74.

[66] *Soares*, 387 N.E.2d at 514; *see also* Wainwright v. Witt, 105 S. Ct. 844, 852 (1985)(need to balance right of jury impartiality and right of fair jury selection). Saltzburg and Powers offered this critical analysis of the impact of *Wheeler* and *Soares*:

> These decisions differ from *Swain* in several important respects. First, they assume that the peremptory challenge is intended to be used only to eliminate specific bias from the jury. This assumption signals a significant departure from the traditional understanding of the challenge as one exercised for any reason or for no reason. Second, they assume that a jury from which some ranges of presumed bias have been excluded is no longer impartial, while *Swain* assumed that permitting unrestricted peremptory challenges furthered impartiality. Third, they presume that the peremptory challenge can be subject to judicial control without compromising its essential purpose—a proposition that *Swain* rejected.

Saltzburg & Powers, *supra* note 19, at 353.

The Supreme Court heard oral argument on December 11, 1985, in Batson v. Kentucky, 84-SC-733-MR (Ky. Dec. 20, 1984)(unpublished), *cert. granted*, 105 S. Ct. 2111 (1985), *arg'd* 54 U.S.L.W. 3445 (U.S. Dec. 11, 1985)(No. 84-6263), a case involving a black defendant's claim that he was denied his sixth amendment right to a fair and impartial jury because the prosecutor used peremptory challenges to remove blacks from the jury venire. The state supreme court adhered to the *Swain* standard. The Supreme Court will render an opinion concerning the discriminatory use of peremptory jury challenges in the near future.

Other federal and state courts have recently followed *Swain* and refused to limit the prosecutor's exercise of peremptory challenges. *See, e.g.*, Prejean v. Blackburn, 743 F.2d 1091, 1104 (5th Cir. 1984)(state law conviction upheld due to insufficient proof of systematic exclusion) *modified*, 765 F.2d 482 (5th Cir. 1985); United States v. Thompson, 730 F.2d 82, 85 (8th Cir.)(held there was no sixth amendment exception to *Swain*), *cert. denied*, 105 S. Ct. 443 (1984); United States *ex rel.* Allen v. Hardy, 586 F. Supp. 103, 105 (N.D. Ill. 1984)(three obstacles to defendant's challenge of *Swain* not overcome); King v.

In the instant case, the United States Court of Appeals for the Second Circuit reasoned that since the defendant presented evidence of the prosecution's discriminatory use of the peremptory challenges only in defendant's single case, then the defendant could not make a successful constitutional challenge on equal protection grounds because of the still viable *Swain* decision.[67] However, the court reasoned further that since the guarantee of an impartial jury trial was binding on the states,[68] and since the fundamental purpose of the jury was to provide a common-sense buffer between the defendant and the state,[69] then every defendant was entitled to the possibility of a petit jury whose composition represented a fair cross section of the community,

---

County of Nassau, 581 F. Supp. 493, 504 (E.D.N.Y. 1984)(use of racial criteria for party's own interest does not violate sixth or fourteenth amendment); People v. Payne, 99 Ill. 2d 135, 457 N.E.2d 1202, 1204 (1983)(right to exercise peremptory challenges in accord with *Swain* standard unaffected by *Taylor*), *cert. denied*, 105 S. Ct. 447 (1984). *But see* United States *ex rel.* Teague v. Lane, 779 F.2d 1332, 1332 (7th Cir. 1985)(en banc review ordered to reconsider panel opinion establishing procedure to limit prosecutorial abuse of peremptory challenges); Booker v. Jabe, 775 F.2d 762, 772-73 (6th Cir. 1985)(adopting procedure to limit improper use of peremptory challenges); United States v. Leslie, 759 F.2d 366, 373-35 (5th Cir. 1985)(invocation of federal supervisory power over federal prosecutors, subjecting their racially-based peremptory challenges to judicial scrutiny), *reh'g en banc granted*, 761 F.2d 195 (5th Cir. 1985); Roman v. Abrams, 608 F. Supp. 629, 635, 642 (S.D.N.Y. 1985)(successful habeas petition; invidious use of peremptory challenges to exclude whites from petit jury controlled by precedent of McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984)).

Other approaches to the problem raised by *Swain*, *Wheeler*, and *Soares* involve in-depth studies using juror profiles, shadow juries, mock trials and experiments concerning examination during voir dire. More specifically, a study is to be conducted by The Center for Jury Studies of the National Center for State Courts in Washington, D.C., to evaluate and gather data from a number of courts concerning court practices in the conduct of voir dire, challenges, and composition of actual juries selected. 71 A.B.A. J. 35 (1985). *See generally* R. HASTIE & S. PENROD & N. PENNINGTON, INSIDE THE JURY 4 (1983)(contention that behavioral sciences can provide empirical evaluation of jury performance); Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491 (1978)(same).

[67] McCray v. Abrams, 750 F.2d 1113, 1123-24 (2d Cir. 1984). Even though both the defendant and the state urged the court to rule that the *Swain* standard was no longer good law, the court found *Swain*'s holding unequivocal and direct. *Swain* prohibited a successful equal protection challenge by a defendant based solely on the prosecutor's acts in a single case. *Id.* at 1124.

[68] *Id.* All aspects of impartial jury trial apply to the states, including prohibition of exclusion of blacks, women, and conscientious objectors from the venire, examination of the number of jurors necessary to represent a cross section of the community, and whether a less-than-unanimous vote is sufficient for a guilty verdict. *Id.* at 1124-25. *See Duncan*, 391 U.S. at 149 (incorporation of the sixth amendment guarantees into the due process clause of the fourteenth amendment).

[69] *McCray*, 750 F.2d at 1125-27.

free from unreasonable restriction by the state.[70] The court concluded that since the defendant did make the required prima facie showing of a sixth amendment violation, and since the state was not allowed the opportunity to rebut the defendant's proof, then a hearing must be held by the district court to afford the state the opportunity to rebut the defendant's prima facie case.[71]

In a dissenting opinion,[72] Judge Meskill reasoned that since the great weight of legal authority in the federal system and all prior Second Circuit decisions recognized the continued validity of the *Swain* view of the peremptory challenge system,[73] and since the recent sixth

---

[70] *Id.*, at 1128-29. Emphasizing the basic requirement of a fair-cross-section representation on the venire, the court pointed out that the nature of random selection of the jury panel does not permit a guarantee that the petit jury will mirror the community population, but that the possibility of such composition must not be arbitrarily removed by the prosecution's systematic exclusion of certain groups. *Id.* At the challenge stage of the jury selection process, the inquiry to be made under the sixth amendment is whether the prosecution has excused by peremptory challenges those jurors whose personal history or behavior reflect some specific bias, or whether it has exercised its challenges on the basis of racial affiliation alone. *Id.* at 1131. The court drew the distinction that whereas the right to excuse jurors by peremptory challenges is an important right in achieving an impartial jury, it is not rooted in the Constitution. Conversely, the fair-cross-section requirement is fundamental to the constitutionally guaranteed right of trial by an impartial jury. *Id.* at 1126 (quoting Taylor v. Louisiana, 419 U.S. 522, 530 (1975)). Thus, when a conflict exists between the two rights, the right of peremptory challenges must yield to the constitutionally grounded right of an impartial jury trial. *McCray*, 750 F.2d at 1130. The court based its prima facie test for violation of the sixth amendment with respect to peremptory challenges on its adaptation of the Supreme Court's test for sixth amendment violations of venire composition as enunciated in Duren v. Missouri, 439 U.S. 357, 364 (1979). *McCray*, 750 F.2d at 1131-32,; *see supra* notes 9, 57.

[71] *McCray*, 750 F.2d at 1133-34. The court stated that principles of federalism and comity compelled that the state be given an opportunity to respond to the defendant's allegations that it had violated his sixth amendment rights, before granting a writ of habeas corpus, freeing the defendant or granting a new trial. *Id.* at 1134. *See* Bermudez v. Reid, 733 F.2d 18, 22 (2d Cir.)(requirement that federal court give state notice of hearing even though state had repeatedly defaulted in responding to petitioner's allegations), *cert. denied*, 105 S. Ct. 232 (1984).

[72] *McCray*, 750 F.2d at 1135 (Meskill, J., dissenting). The majority opinion was a two-to-one panel decision. *Id.*

[73] *Id.* at 1136 (Meskill, J., dissenting). Citing opinions from the Second Circuit and five other federal circuits, the dissent stated these cases rejected the notion that the sixth amendment decisions by the Supreme Court had undercut *Swain*. *Id.* It further stated that three other circuits had recently reaffirmed the validity of *Swain* though it was not clear if the sixth amendment issue was raised. *Id. But see* United States v. Leslie, 759 F.2d 366, 374 (5th Cir.)(prohibition of federal prosecutors from using peremptory challenges to exclude veniremen on basis of race), *reh'g en banc granted*, 761 F.2d 195 (5th Cir. 1985).

amendment cases were not inconsistent with *Swain*,[74] then the majority's attempt to combat a perceived form of discrimination was contrary to existing law.[75] He further reasoned that since there would be a likely expansion of judicial interrogation to a defendant's, as well as the state's, reasons for making peremptory challenges, then the court's holding would result in "the end of the peremptory challenge as an effective jury tool."[76] The dissent concluded that since group-based assumptions may be logical and valid considerations rather than invidious discrimination on the part of the attorney,[77] then adherence to *Swain* was appropriate.[78]

While the majority of courts adhere to the *Swain* holding,[79] it is apparent that some courts believe a reassessment directed toward the goal of achieving a fair cross section on the petit jury as well as in the jury venire is needed.[80] Subsequent to the *McCray* decision handed

---

[74] *McCray*, 750 F.2d at 1136 (Meskill, J., dissenting). The dissent stated that the relevant sixth amendment decisions focused on systematic exclusion of identifiable groups, and that such a focus was not inconsistent with *Swain*. *Id.* at 1136-37.

[75] *Id.*

[76] *Id.* at 1137 (Meskill, J., dissenting). The dissenting opinion expressed the belief that the majority gave too little weight to the significance of the peremptory challenge as a tool to ensure an impartial jury. *Id.* The dissent noted that the attorney had "not only a right but an obligation to challenge a prospective juror who *may* be biased, even if the basis of her belief is a broad generalization, which may not in fact be true." *Id.* at 1138 (emphasis in original). The judge pointed out that one such broad generalization might be an assumption based on group membership, and by banning the use of such group-based assumptions, the majority severely limited the effectiveness of the peremptory challenge. *Id.* In addition, the judge warned of the obvious implications that once the prosecutor was made subject to interrogation concerning his reasons for a peremptory challenge, it could not be long before defendants would be similarly subjected to interrogation. *Id.* at 1138-39. Noting that the majority used the term "cognizable group" in its prima facie test, the dissenter found that this term allowed virtually limitless numbers of classifications to fall within the majority's standard. *Id.* at 1139. He also expressed concern that inquiry into the prosecutor's motive for exercising a peremptory challenge would entail a tremendous burden in terms of time and attorney integrity. *Id.* at 1140.

[77] *Id.* at 1141. Judge Meskill concluded that the sixth amendment goal of an impartial and unbiased jury was achieved when the attorney was allowed to use his best judgment while exercising the "arbitrary and capricious right" of peremptory challenge within the context of the adversarial system. *Id.* at 1141 (quoting *Swain*, 380 U.S. at 219).

[78] *McCray*, 750 F.2d at 1139 (Meskill, J., dissenting). Judge Meskill would have vacated the order granting defendant's petition for writ of habeas corpus and would have remanded with directions to dismiss the petition. *Id.* at 1141.

[79] *See supra* notes 48 and 66 (list of federal and state courts which adhered to *Swain*).

[80] *See supra* notes 49-53, 61-65, 68-70 and accompanying text. The court set out the following issue to be addressed at a later date: whether the constitution prohibited the

down by the Second Circuit Court of Appeals,[81] the Fifth Circuit Court of Appeals has also placed similar limitations on its federal prosecutors through its supervisory powers.[82]

The alleged conflict between the prosecutor's racially-based use of the state's peremptory challenges and the sixth amendment requirement of an impartial jury arises when the jury venire is reduced to the six- to twelve-person petit jury.[83] The Supreme Court has held that the jury venire must represent a fair cross section of the community.[84] This requirement is viewed by at least one Justice as emanating from fourteenth amendment equal protection guarantees.[85] Supreme Court opinions since 1968,[86] however, view the requirement as one mandated by the impartial jury guarantee of the sixth amendment.[87] The equal protection clause of the fourteenth amendment prohibits government's exclusion of cognizable groups based on the right of all citizens to participate in the judicial process.[88] The impartial jury guarantee of the sixth amendment prohibits government's exclusion of cognizable groups based on the right of the criminal defendant to be judged by his fellow citizens in the community.[89] Both rights are implemented by the fair-

---

prosecutor's use of peremptory challenges to exclude members of a particular group from the petit jury, based on the assumption that they would be biased in favor of members of the same group. McCray v. New York, 461 U.S. 961, 962 (1983). The Court noted that constitutional claims may also apply when distinct groups other than racially identifiable groups are excluded and that the defense, as well as the prosecution, may be subjected to examination concerning the use of his peremptory challenges. *Id.* at 962 n.*.

[81] *McCray*, 750 F.2d at 1114. *See supra* notes 1-14, 67-78 and accompanying text. At the time the Supreme Court denied certiorari in McCray v. New York, 461 U.S. 961 (1983), it noted there was no conflict of decision within the federal system. *Id.* at 962.

[82] For a discussion of United States v. Leslie, 759 F.2d 366 (5th Cir. 1985), see *supra* note 35.

[83] *See supra* notes 19, 35, 43-45 and accompanying text. The dissent in *Swain* argued that the Court's previous jury decisions had never distinguished between exclusion from the jury panel and exclusion from the jury itself. *Swain*, 380 U.S. at 239 (Goldberg, J., dissenting).

[84] *See supra* notes 40-42 and accompanying text.

[85] *See supra* text accompanying note 59.

[86] *See supra* notes 37-39 and accompanying text.

[87] *See supra* notes 40-41 and accompanying text.

[88] *See supra* notes 21-29 and accompanying text. The *Taylor* court found that exclusion of racial groups from jury service was contrary to our basic concepts of a democratic society and a representative government since the jury was the instrument of public justice. Such exclusion was forbidden by the equal protection clause. *Taylor*, 419 U.S. at 527. "Community participation in the administration of the criminal . . . is . . . critical to public confidence in the fairness of the criminal justice system." *Id.* at 530.

[89] *See supra* notes 41, 45 and accompanying text. The jury, summoned to determine defendant's rights, was a "body of men" composed of the defendant's peers, meaning

cross-section requirement,[90] and converge in voir dire.[91] Thus, there is no conceptual conflict between the goal of the *Swain* holding and the goals of the majorities in the *Taylor-Wheeler-McCray* holdings.

The question, then, is whether the reduction of the jury venire to the smaller petit jury infringes upon either the equal protection rights of cognizable groups or the fair-cross-section jury right of the criminal defendant. The potential for infringement upon either or both rights does exist and a balancing of interests is required.[92] In point of time the trial begins and the defendant's sixth amendment rights are operative at voir dire because our adversarial system of justice comes into play at this point.[93] The adversary system is designed to assure that both the defendant and the state be allowed to reject jurors for specific individual bias (challenges for cause) and for mere suspected bias (peremptory challenges).[94] The underpinnings for the exercise of peremptory challenges by the attorney for both the state and the defense are (1) the attorney's professional judgment grounded in experience, intellect and intuition,[95] and (2) his desire to select a jury most favorable to his "client."[96] To curtail only the prosecutor's use of racially-based peremptory challenges will create both procedural and substantive imbal-

---

"his neighbors, fellows, associates." *Strauder*, 100 U.S. at 308-09.

[90] *See* Saltzburg & Powers, *supra* note 19, at 373 (discussion of consistency of *Swain* with cross-section theory in *Taylor*). *See supra* notes 25-32, 41, 45 and accompanying text. *See generally* Babcock, *supra* note 19, at 350-52 (discussion of interplay of individual bias with fair-cross-section requirement).

[91] For an explanation of voir dire, see *supra* note 19; *see also* Schematic Conceptualization, attached as Appendix.

[92] *See supra* notes 45, 58, 62 and accompanying text.

[93] *See supra* notes 19, 27, 76 and accompanying text. "Under the adversary framework of a trial, however, *society* is neutral; neither side is favored . . . each speaks only for itself." United States v. Leslie, 759 F.2d 381, 392 (5th Cir. 1985)(Garwood, J., dissenting)(emphasis in original).

[94] *See supra* notes 19, 30, 76-77 and accompanying text. The Court in 1887, discussing the use of peremptory challenges, stated, "It is to be remembered that such impartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." Hayes v. Missouri, 120 U.S. 68, 70 (1887). *See* Zeisel & Diamond, *supra* note 66 at 496-97 n.8 (discussion of federal and state laws governing number of peremptory challenges); United States v. Leslie, 759 F.2d 381, 394-95 (5th Cir. 1985)(Garwood, J., dissenting)(legislative history of Federal Jury Selection and Service Act of 1968).

[95] *See supra* notes 15, 30 and accompanying text. *See* Saltzburg & Powers, *supra* note 19, at 363 (trial lawyer's reliance on experience, intuition, and common sense was justified in exercise of peremptory challenges).

[96] *See supra* notes 15, 76 and accompanying text. *See* Jorgenson, *supra* note 34, at 575 (trial counsel had no duty to select panel which was objective, quoting M. Belli).

ance in the adversary process.[97] The better approach would be to expand voir dire so that both the state and the defense may examine the jury venire, then permit each party unlimited challenges for cause, but restrict the number of peremptory challenges to such extent that their limited number will become determinative of their careful and proper use by each party's attorney.[98] The state, as well as the defendant, is entitled to fairness in our adversarial system of justice, and fairness requires that a proper and true balance be maintained.[99]

G. Kay L. Trapp

---

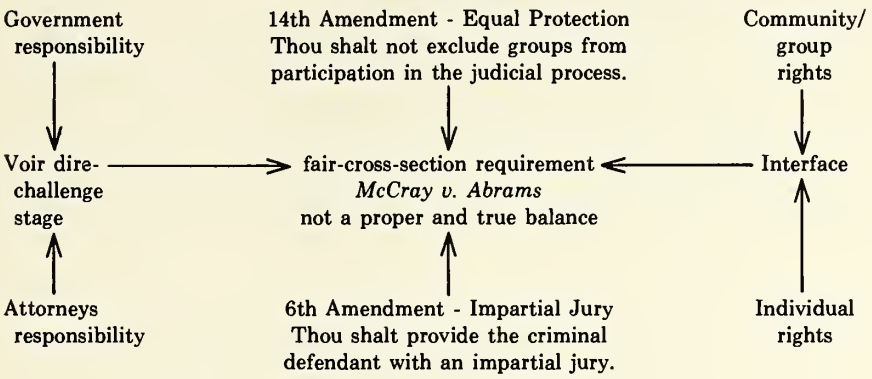
[97] *See supra* note 45, 76 and accompanying text.

[98] Saltzburg & Powers, *supra* note 19, at 365, 382-83. *See* Jorgenson, *supra* note 34, at 574, 577-79 (suggestion that number of peremptory challenges should be re-evaluated).

[99] *See supra* note 66, 76, 95 and accompanying text; *see also* Jorgenson, *supra* note 34, at 581.

APPENDIX

Constitutional Rights and Jury Selection: Schematic Conceptualization


Swain v. Alabama
Government responsibility
14th Amendment - Equal Protection
Thou shalt not exclude groups from participation in the judicial process.
Community/ group rights
Voir dire- challenge stage
fair-cross-section requirement
McCray v. Abrams
not a proper and true balance
Interface
Attorneys responsibility
6th Amendment - Impartial Jury
Thou shalt provide the criminal defendant with an impartial jury.
Individual rights
Taylor v. Louisiana
Duren v. Missouri

Corporations—Products Liability—Expansion of Successor Corporation Liability Through the Continuity of Enterprise Theory

Plaintiff,[1] invoking diversity jurisdiction,[2] filed suit in the United States District Court for the Southern District of Mississippi to recover damages from defendants[3] for injuries allegedly caused by the defective design of a cherry picker boom.[4] Plaintiff filed suit against defendant corporation as a successor corporation[5] and defendant corporation's president.[6] The district court granted a directed verdict in favor of defendant corporation's president as to his personal liability,[7] but denied a directed verdict to defendant corporation on the theory of successor liability.[8] After a jury verdict for the plaintiff,[9] the district

---

[1] Plaintiff Elbie Mozingo was injured in a collapse of a Skyworker boom. Mozingo v. Correct Mfg. Corp., 752 F.2d 168, 171 (5th Cir. 1985).

[2] *Id.* Plaintiff brought suit under 28 U.S.C. § 1332(a)(2)(1982), which vests in the United States district court subject matter jurisdiction over a foreign corporation and a state resident. *Mozingo*, 752 F.2d at 171.

[3] *Mozingo*, 752 F.2d at 171. Defendants were Correct Manufacturing, Inc., the owner of the Skyworker manufacturing company, and G.W. Way, the president of Correct Manufacturing, Inc. *Id.*

[4] *Id.* A cherry picker boom is similar to a crane with a bucket attached to the end of its boom. *Id.* Plaintiff contended that the design of the boom was defective because it did not have a retaining clamp which would prohibit the cable from slipping off its yoke. *Id.* Plaintiff was injured when the cable slipped and the boom collapsed, plummeting plaintiff to the ground. *Id.*

[5] *Id.* A successor corporation is defined as one which acquires the manufacturing assets of another corporation. 15 W. Fletcher, Cyclopedia of the Law of Private Corporations § 7122 (rev. perm. ed. 1983). In *Mozingo*, a wholly-owned subsidiary named Correct Manufacturing Corp. had been formed to acquire certain manufacturing assets, including the Skyworker manufacturing enterprise, of another corporation. *Mozingo*, 752 F.2d at 173.

[6] *Id.* at 173. Under Mississippi case law an officer of the corporate tortfeasor may be held personally liable if he directly participated in or authorized the commission of a tort. *Id.*

[7] *Id.* at 171. The Fifth Circuit Court of Appeals, in affirming the district court, stated that the corporate president could not be held liable absent his being the directing or main figure in the activity. *Id.* at 174. Since Mr. Way, the president, did not direct the manufacture of this particular model boom, the circuit panel held that the evidence was insufficient to support a jury finding of Mr. Way's personal involvement in the tort. *Id.*

[8] *Id.* at 171. The court's standard for granting or denying a directed verdict motion was whether, in light of all of the evidence most favorable to the non-moving party, there was such evidence that reasonable men would differ as to the outcome. If there were

court granted the defendant corporation a judgment notwithstanding the verdict.[10] On appeal, the United States Court of Appeals for the Fifth Circuit, *held*, affirmed in part, reversed and remanded in part.[11] Where the successor corporation can be shown to be the continuation of the predecessor's corporate enterprise, the court may expand the scope of the mere continuation exception to the traditional non-liability rule by using the continuity of enterprise doctrine to hold the successor corporation liable for products liability claims. *Mozingo v. Cor-*

---

such evidence, the question should be for the trier of fact. *Id.* at 176. The court herein concluded that there was sufficient evidence to form a question for the jury as to the liability of Correct under the corporate successor liability theory. *Id.* at 177-78. The successor liability theory was generally stated by the Fifth Circuit as a rule that an acquiring corporation, known as the successor corporation, does not take the liabilities of the predecessor corporation; there are, however, exceptions in certain situations. *Id.* at 174; *see infra* notes 36-37 and accompanying text.

[9] *Mozingo*, 752 F.2d at 171. The case was submitted to the jury on three theories of liability, which were negligence, strict liability in tort, and breach of independent duty to warn. *Id.*

[10] *Id.* Even though the defendant corporation had not urged the issue at any time during the trial, the district court granted J.N.O.V. pursuant to a recent decision based on collateral estoppel. *Id.* at 172; *see* Gaither v. Hughes-Keenan Corp., 721 F.2d 817 (5th Cir. 1983)(unpublished opinion)(since Skyworker company was part of Hughes-Keenan division, district court applied collateral estoppel). The two purposes of collateral estoppel are to prevent parties from having to relitigate the identical issue with the same party and to prevent needless litigation. *Mozingo*, 752 F.2d at 172. The court noted that since collateral estoppel was a variant of res judicata, it was, in form, an affirmative defense and as such under FED. R. CIV. P. 8(c) it must be pled, or it will be considered waived. *Mozingo*, 752 F.2d at 172. The trial court had discretion as to allowing amendment of the pleading when no prejudice would result to the opposing party or when justice so required. *Id.* In the instant case, however, the issue of collateral estoppel was not raised until after the jury decision. *Id.*

[11] *Mozingo*, 752 F.2d at 172, 174, 176. Plaintiff appealed both the granting of the J.N.O.V. on the collateral estoppel basis and the granting of the directed verdict as to personal liability of Mr. Way, the corporation's president. Correct Manufacturing cross-appealed on the bases that there was insufficient evidence for liability on any of the three theories submitted to the jury and that the court erred in instructing the jury on the product-line theory of successor corporation liability. *Id.* at 172; *see infra* note 65 (defining product-line theory). The Fifth Circuit reversed the J.N.O.V., reasoning that equity and the two underlying purposes of collateral estoppel strongly prohibited the assertion of this defense after the trial. *Mozingo*, 752 F.2d at 172.

The court affirmed the district court's granting of a directed verdict in favor of the corporation's president, G.W. Way. *Id.* at 174. The Fifth Circuit reasoned that since sufficient evidence on each of the three liability theories warranted sending them to the jury and since the jury had made its determination in favor of plaintiff, it ordered that verdict to be reinstated. *Id.* at 178. The court specifically stated that a jury instruction on Correct Manufacturing's liability as a successor corporation under the continuity of enterprise theory was not clearly wrong and thus affirmed the district court. *Id.* at 176, 178.

rect Manufacturing Corp., 752 F.2d 168 (5th Cir. 1985).

Historically, products liability as a legal theory[12] began with the English case of *Winterbottom v. Wright*[13] where the plaintiff, injured when a wheel of a stagecoach collapsed, sued the defendant who was responsible for the maintenance of the coach.[14] The English court denied relief due to a lack of privity of contract.[15] Though several exceptions to the requirement of privity of contract evolved,[16] *MacPherson v. Buick Motor Co.*[17] was its death knell.[18] In *MacPherson*, a modern day factual twin to *Winterbottom*, the plaintiff was injured when a defective wheel fell from his car, thereby causing a crash.[19] The *MacPherson* court held that the manufacturer had breached his duty to use reasonable care in the manufacture of his product.[20] Therefore, the

---

[12] *See generally* W. PROSSER, THE LAW OF TORTS 641 (4th ed. 1971)(outline of historical development of products liability law); D. OWLES, THE DEVELOPMENT OF PRODUCT LIABILITY IN THE USA (1978)(interesting slant on products liability history by English professor).

[13] 152 Eng. Rep. 402 (Ex. 1842).

[14] *Id.* at 403.

[15] *Id.* at 405. The English court stated that if the remedies were not limited to the parties of the contract, the consequences would be outrageous. *Id.* The requirement for privity of contract between the parties was a major hurdle between the plaintiff and his right to recover. *See, e.g.*, Stone v. Van Noy R.R. News Co., 153 Ky. 240, 154 S.W. 1092, 1094 (1913)(bottle manufacturer not liable to third party for explosion of bottle); Liggett & Myers Tobacco Co. v. Cannon, 132 Tenn. 419, 178 S.W. 1009, 1011 (1915)(manufacturer of tobacco plug with bug inside not liable to consumer); Hansbrouch v. Armour & Co., 139 Wis. 357, 121 N.W. 157, 160 (1909)(manufacturer of soap with needle inside not liable to consumer). The mistake of this privity requirement being applied to torts was discussed in Bohlen, *The Basis of Affirmative Obligations in the Law of Torts*, 44 AM. L. REG., N.S., 209, 280-85 (1905), and Bohlen, *50 Years of Torts*, 50 HARV. L. REV. 1225, 1232-34 (1937).

[16] *See* Thomas v. Winchester, 6 N.Y. 397, 409 (1852)(one of first courts in United States to ignore privity of contract where product was inherently dangerous). Another historical exception was tainted food as illustrated by a statute of Henry III in 1266 which forbade the selling of "corrupt victuals." 51 HEN. 3, ch. 6 (1266), *reprinted in* D. OWLES, *supra* note 12, at 33, 45; *see also* Huset v. J.I. Case Threshing Machine Co., 57 C.C.A. 237, 242-43, 120 F. 865, 870-71 (8th Cir. 1903). The three major exceptions to privity as set forth in *Huset* were where the consumer was placed in imminent danger of physical harm by the manufacturer, where an owner's negligence caused his invitee to be injured by use of a defective product, and where a party sold a known inherently dangerous product without warning the consumer. *Id.*

[17] 217 N.Y. 382, 111 N.E. 1050 (1916).

[18] *Id.* at 1053. *See generally* W. PROSSER, *supra* note 12, at 641-42, 650-56 (discussion of abolition of privity requirement).

[19] *MacPherson*, 111 N.E. at 1051.

[20] *Id.* at 1053; *see also* Johnson v. Cadillac Motor Car Co., 261 F. 878, 882, 886-87 (2d Cir. 1919)(similar facts to *MacPherson* and one of first to follow its tort duty theory).

basis of recovery being tort, not contract, there was no need for privity of contract.[21] Thereafter, however, some courts did allow contract law defenses when a products injury claim was brought under the manufacturer's implied warranty of safety theory.[22]

In *Greenman v. Yuba Power Products, Inc.*,[23] Justice Traynor led a unanimous court in his argument for applying strict liability in tort to products liability cases.[24] The court reasoned that with the abandonment of the privity requirement and with the general refusal by the courts to uphold contract defenses in products liability cases, the basis for liability should be tort law.[25] After *Greenman* and the adoption by the majority of the states of section 402A of the Restatement Second of Torts,[26] strict liability in tort was extended to wholesalers,[27] retail-

---

[21] *MacPherson*, 111 N.E. at 1053. *See generally* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1100-14 (1960)(*MacPherson*'s abandonment of privity); Prosser, *Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 793 (1966)(no need for privity in cases after *MacPherson*); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 5 (1965)(privity requirement no longer needed).

[22] *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 384, 161 A.2d 69, 84 (1960)(manufacturer's liability based on implied warranty of safety running with product to ultimate user). The contract defenses most often allowed were general disclaimer provisions and the notice requirement under the Uniform Commercial Code. *See generally* W. PROSSER, *supra* note 12, at 655 (discussing implied warranty theory).

[23] 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[24] *Greenman*, 377 P.2d at 901, 27 Cal. Rptr. at 701. Justice Traynor, in stating the new law, said that a manufacturer would be strictly liable in tort for any injury caused by his product because he put the product on the market with the knowledge that the consumer would not inspect it for defects. *Id. Contra* Walton v. Chrysler Motor Corp., 229 So. 2d 568, 572 (Miss. 1969)(rule does not apply to manufacturer where defect did not initially cause accident; "enhanced injuries" exception).

[25] *Greenman*, 377 P.2d at 901, 27 Cal. Rptr. at 701.

[26] RESTATEMENT (SECOND) OF TORTS § 402A (1965). The major author of § 402A was Dean Prosser who based the section on Justice Traynor's concurring opinion for strict liability in tort in Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944), written 14 years earlier. *See* Wade, *Strict Tort Liability for Products: Past, Present and Future*, 13 CAP. U. L. REV. 335, 342 (1984). The *Escola* rationale of strict liability of the manufacturer and cost-spreading, which is still cited as the primary policy underlying products liability, was incorporated into the current version of § 402A:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale

ers,[28] lessors,[29] bailors,[30] and trademark licensors.[31] However, the state of the law as to the liability of the business purchaser for claims arising from the products of the business seller[32] has not been clearly established.[33]

In *Kloberdanz v. Joy Manufacturing Co.*,[34] while plaintiff was working on defendant's oil drilling rig, a defective piece of the rig fell and injured him.[35] The District Court for Colorado followed the tradi-

---

of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[27] *See* Cannifax v. Hercules Powder Co., 237 Cal. App. 2d 44, 46 Cal. Rptr. 552, 557 (1965)(manufacturer and wholesaler of blasting fuses both held liable). *See generally* Note, *Products Liability—Wholesalers—Economic Loss*, 19 ME. L. REV. 92 (1967)(strict liability applied to wholesalers).

[28] *See* Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1964)(manufacturer and retailer of auto held liable for defective brakes); *cf.* Sam Shainberg Co. v. Barlow, 258 So. 2d 242, 244-45 (Miss. 1972)(Mississippi retailer not liable under closed package exception). *See generally* J. WITTENBERG, PRODUCTS LIABILITY, THE LAW IN MISSISSIPPI §§ 4-7 (1982)(discussion of *Shainberg* rule); Lascher, *Strict Liability in Tort for Defective Products: The Road to and Past Vandermark*, 38 S. CAL. L. REV. 30 (1965)(analysis of retailer liability after *Vandermark*).

[29] *See* Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769, 777-78 (1965)(lessor of rental truck held liable). For a critique of lessor liability, see Note, *Products Liability—Implied Warranties—Lessor Held Liable for Defects Arising During the Term of the Lease*, 41 N.Y.U. L. REV. 1002 (1966).

[30] *See* Martinez v. Nichols Conveyor & Eng'g Co., 243 Cal. App. 2d 795, 52 Cal. Rptr. 842, 844 (1966)(bailor of paper baler held liable). *See generally* Note, *Products Liability—Liability of the Bailor for Hire for Personal Injuries Caused by Defective Goods*, 51 N.C.L. REV. 786 (1973)(overview of bailor liability).

[31] *See* Kasel v. Remington Arms Co., 24 Cal. App. 3d 711, 725, 101 Cal. Rptr. 314, 323 (1972)(trademark licensor or franchisor liable because in stream of commerce of defective product).

[32] *See generally* 15 W. FLETCHER, *supra* note 5, at § 7122. The business seller is more commonly called the predecessor or transferor corporation. *Id.* The traditional corporate non-liability rule has been applied, however, when the predecessor was a sole proprietorship. *See, e.g.*, Tift v. Forage King Indus., Inc., 102 Wis. 2d 327, 306 N.W.2d 289, 291 (1982)(even though predecessor was sole proprietor, successor held liable under continuity of enterprise exception). *Contra* Lemire v. Garrard Drugs, 95 Mich. App. 520, 291 N.W.2d 103, 105 (1980)(no successor liability when predecessor found to be noncorporate entity).

[33] *See generally* L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 5.06 (1985)(general discussion of successor liability in products liability claims with cases listed).

[34] 288 F. Supp. 817 (D. Colo. 1968).

[35] *Id.* at 818. The defendant had acquired certain assets of the manufacturer of the defective part. *Id.* at 818-19.

tional non-liability rule[36] which states that when the transfer of all the assets of one corporation to another is made, the transferee does not become responsible for the debts and liabilities of the transferor.[37] The court therefore did not hold the successor corporation liable[38] because it did not find any of the four traditional exceptions applicable.[39] The first exception was an express or implied assumption of liability.[40] The second exception was applicable if the sale of assets amounted to a

---

[36] *Id.* at 820.

[37] *See* 15 W. FLETCHER, *supra* note 5, at § 7122 (general explanation of rule). This rule is based on corporate law and was created to protect business creditors and shareholders. *Id.* The rule is premised upon the notion that the mere succession to another corporation's property is not a sufficient theory upon which to place liability. *See, e.g.*, Tucker v. Paxton Mach. Co., 645 F.2d 620, 624, 626 (8th Cir. 1981)(successor's use of predecessor's goodwill alone did not create liability); Schumacher v. Richards Shear Co., 59 N.Y.2d 239, 245, 451 N.E.2d 195, 198-99, 464 N.Y.S.2d 437, 440 (1983)(no liability imposed because successor did not buy predecessor's plant or equipment). *See generally* Note, *Post Dissolution Product Claims and the Emerging Rule of Successor Liability*, 64 VA. L. REV. 861, 869 (1978)(analysis of traditional rule, traditional exceptions, and newer expansions).

[38] *Kloberdanz*, 288 F. Supp. at 822. Since the transfer did not fit into an exception, no liability accrued to the successor corporation. *Id.* at 821.

[39] *Id.* at 820-21. The court refused the express assumption exception even though the successor corporation had assumed some liabilities of the predecessor corporation. *Id.* at 821; *see infra* note 40 (discussion of express assumption exception). The court also refused to follow the de facto exception because the predecessor corporation in *Kloberdanz* had remained viable for 10 months after the asset transfer. *Kloberdanz*, 288 F. Supp. at 821. *Contra* Knapp v. North Am. Rockwell Corp., 506 F.2d 361, 368-70 (3d Cir. 1974)(18 month period of predecessor viability after asset sale did not preclude merger), *cert. denied*, 421 U.S. 965 (1975). *See infra* note 41 (discussion of de facto merger exception). Since there was no continuity of ownership, directors, or officers, the continuation exception was inapplicable also. *Kloberdanz*, 288 F. Supp. at 821; *see infra* note 42 (discussion of continuation exception). The court held the exception for fraud was inapplicable because there was no allegation of fraud. *Kloberdanz*, 288 F. Supp. at 821; *see infra* note 43 (discussion of fraud exception).

[40] *Kloberdanz*, 288 F. Supp. at 820. Though it would seem that a written assumption agreement between two corporations would be straightforward with respect to tort liability, the courts have interpreted similarly worded agreements in differing manners, either as a broad assumption of all liabilities or as a total exclusion to implied tort liability. *Compare* Bouton v. Litton Indus., Inc., 423 F.2d 643, 652 (3d Cir. 1970)(successor corporation held liable due to broad interpretation) *and* Bippus v. Norton Co., 437 F. Supp. 104, 107 (E.D. Pa. 1977)(successor held liable due to broad categories used in agreement) *with* Johnson v. Marshall & Huschart Mach. Co., 66 Ill. App. 3d 766, 384 N.E.2d 141, 145 (1973)(successor not liable since 36 years separated sale and injury and several successors were prior to present one). *See generally* Note, Cyr v. B. Offen & Co.: *Liability of Business Transferees for Product Injuries*, 27 ME. L. REV. 305, 311 (1975)(express assumption of some corporate liabilities may lead to liability for tort claims also).

merger or consolidation of the two corporations, a de facto merger.[41] The court noted that the third exception was available when the buyer was only a mere continuation of the seller.[42] The fourth traditional exception arose where the sale of assets was fraudulent.[43] By not holding

---

[41] *Kloberdanz*, 288 F. Supp. at 820. The de facto merger corporate doctrine developed as a protective means by which dissenting stockholders could have their stock appraised even though the asset transfer did not meet the statutory merger requirements. *See* Phillips, *Product Line Continuity and Successor Corporate Liability*, 58 N.Y.U. L. Rev. 906, 909 (1983)(discussion of stockholder rights in acquisitions).

Even if the asset transfer did not meet the statutory requirements, it could be a de facto merger if the transfer indicated a continuation of the enterprise as evidenced by a continuity of management, personnel, physical location, assets, and general business operations; the transfer would also have to indicate a continuity of shareholders resulting from the purchaser having bought the seller's assets with stock of the purchaser corporation. In addition, the seller must have ceased its ordinary business operations, liquidated, and dissolved as soon as was legally possible; and the purchaser must have assumed the liabilities and obligations of the seller to have a continued and normal uninterrupted business operation. Shannon v. Samuel Langston Co., 379 F. Supp. 797, 801 (W.D. Mich. 1974). These four requirements were stated as the traditional de facto merger criteria. *Id.* The court in *Shannon* found that all the above factors were met and therefore imposed liability. *Id.* at 802. The court stated that a corporation cannot be allowed to avoid liability simply by shuffling paper. *Id.* at 803; *see* Note, *supra* note 37, at 869 (policies used by recent courts in breaking from traditional corporate analysis).

In contrast to the *Shannon* traditional approach, the Third Circuit Court of Appeals in Knapp v. North Am. Rockwell Corp., 506 F.2d 361, 367 (3d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975), held the successor liable even though the predecessor did not dissolve until 18 months after the corporate transfer and four months after the injury. The *Knapp* court expanded the de facto doctrine because the successor corporation could better bear the loss and because the plaintiff would be without a remedy unless the successor were held liable. *Id.* at 367-70. *See generally* Note, *Corporations—Products Liability—Corporate Transaction Structured as a Sale of Assets Treated as De Facto Merger so as to Hold Transferee Corporation Accountable for Product Liability Claim Against Dissolved Transferor*—Knapp v. North Am. Rockwell Corp., 6 SETON HALL L. REV. 477, 493-94 (1975)(liability imposed though corporate transfer was actually sale of assets).

[42] *Kloberdanz*, 288 F. Supp. at 820. There is no uniform test for the continuation exception. *See* Ozan Lumber Co. v. Davis Sewing Mach. Co., 284 F. 161, 165 (D. Del. 1922)(test is continuation of corporation as legal entity); *Kloberdanz*, 288 F. Supp. at 821 (tests are continuation of ownership and management and dissolution of seller corporation). Some courts required a broader interpretation in that the predecessor must have created the successor corporation for the purpose of transferring the assets, stockholders, and management. *See, e.g.*, Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 P. 780, 783 (1919)(successor, created by predecessor, held liable for predecessor's lease). The early decisions held and a few jurisdictions still hold that the transfer must be for inadequate consideration. *See generally*, R. Aylward & J. Aylward, *Successor Liability for Defective Products—Misplaced Responsibility*, 13 STET. L. REV. 954, 958 (1984)(discussion of mere continuation exception and inadequate consideration).

[43] *Kloberdanz*, 288 F. Supp. at 820. The fraudulent transaction has usually been

the successor liable, the *Kloberdanz* court acknowledged the importance of the form of the asset transfer in determining whether liability would be imposed.[44] Since the traditional corporate non-liability rule was based on corporate law and policy,[45] the harshness of this rule, when applied to innocent victims of defective products, conflicted with the basic propositions of strict liability in tort.[46]

In 1974 the Circuit Court of Appeals for the First Circuit reviewed the non-liability corporate rule and the general underlying principles of tort liability for products injuries in *Cyr v. B. Offen & Co.*[47] In *Cyr*[48] two employees were injured in the ovens of a printing press manufactured by the predecessor corporation.[49] The *Cyr* court held the successor liable as a mere continuation of the predecessor.[50] However, the court noted that there was no continuity of ownership or management

---

evidenced by a lack of adequate consideration. *See* McKee v. Harris-Seybold Co., 109 N.J. Super. 555, 264 A.2d 98, 107 (Law Div. 1970), *aff'd per curiam*, 118 N.J. Super. 480, 288 A.2d 585 (App. Div. 1972)(no fraud or inadequate consideration when cash and stock exceeded value of assets). *But see* Wolff v. Shreveport Gas, Elec. & Power Co., 138 La. 743, 70 So. 789, 795 (1916)($1,000 inadequate for all assets of predecessor when no liabilities assumed).

[44] *Kloberdanz*, 288 F. Supp. at 820. The fact that the form used by a corporation to transfer its assets determined whether the successor or the predecessor was to be held liable was in opposition to the underlying policies of products liability. *See* Note, *supra* note 37, at 867.

[45] *See* Woody v. Combustion Eng'g Inc., 463 F. Supp. 817, 821 (E.D. Tenn. 1978)(underlying policy of traditional rule was to protect creditors and to promote transferability of businesses). A different theory for the traditional rule's promotion of alienability of corporate assets was based on the bona fide purchaser doctrine in real property. *See generally*, Note, *Assumption of Products Liability in Corporate Acquisitions*, 55 B.U.L. REV. 86, 93 (1975)(analysis of successor non-liability to bona fide purchaser for value without notice).

[46] *See Greenman*, 377 P.2d at 901, 27 Cal. Rptr. at 701 (policy rationales stated for justifying strict liability); *see supra* note 24 (J. Traynor's rationale in *Greenman*).

[47] 501 F.2d 1145 (1st Cir. 1974).

[48] The action in *Cyr* was brought in federal court based on diversity jurisdiction. *Id.* at 1150. Erie R.R. v. Tompkins, 304 U.S. 64 (1938), required that the federal courts apply state law in diversity cases. *See Recent Developments*, 30 VAND. L. REV. 238, 243-44 (1977)(traditional exceptions to corporate law rule have been expanded by some federal courts).

[49] *Cyr*, 501 F.2d at 1148. The ovens were used to dry the ink on the presses. *Id.* At the time of the manufacture of the ovens, B. Offen was a sole proprietorship. *Id.* at 1151. After the death of the owner, several key employees bought the assets, which included the name, goodwill, and service contracts, and assumed the obligations of the manufacturer. *Id.*

[50] *Id.* at 1154. The successor agreed to use the same business practices, produce the same product in the same plant using the same employees, and represent itself as the same company. *Id.* at 1151.

as generally required.[51] Regardless of this deviation, the *Cyr* court stated that though ownership of the entity, which retained basically the same name, was an important factor to consider, it was not the determining factor for liability.[52] What the *Cyr* court determined to be the controlling factor was the continuation of the corporate enterprise through the manufacture of the same product in the same plant by the same work force.[53] *Cyr* broadened the scope of the mere continuation[54] exception by not requiring continuity of ownership of the corporate entity in a products liability claim.[55]

The *Cyr* change from emphasis on the corporate entity continuance[56] to emphasis on the enterprise continuance[57] was the origin of the product-line analysis set forth in *Ray v. Alad.*[58] With a factual situation similar to that in *Cyr*, the Supreme Court of California in *Ray* created a completely new exception to the traditional non-liability rule.[59] Although the plaintiff had been injured by a ladder manufactured by the predecessor, the successor had also continued to produce

---

[51] *Id.* at 1154. Since the transaction was an asset-for-cash transfer, the continuation of ownership factor was not satisfied. *Id.* at 1151; *see supra* note 42 and accompanying text (discussion of mere continuation exception).

[52] *Cyr*, 501 F.2d at 1154.

[53] *Id.* The *Cyr* court used the labor law definition of successorship as defined in John Wiley & Sons v. Livingston, 376 U.S. 543, 551 (1964). The United States Supreme Court in *Wiley* used labor criteria to determine continuity including composition and size of the work force, personnel policy, production lapses, product changes, changes in plant location, and changes in internal operations. *Id.*

[54] *Cyr*, 501 F.2d at 1153. The representation or holding-out as a continuation of the predecessor was considered by the court to be an exploitation of the predecessor's goodwill. *Id.* at 1154. Since the customers were not notified of the corporate change and assumed that the product was still that of the predecessor, the court felt that this nondisclosure justified imposition of liability upon the successor. *Id.* at 1153. For a case following the *Cyr* exception, see Holloway v. John E. Smith's Sons Co., 432 F. Supp. 454 (D.S.C. 1977). For a case refusing to follow the *Cyr* exception, see Tucker v. Paxson Mach. Co., 645 F.2d 620 (8th Cir. 1981).

[55] *Cyr*, 501 F.2d at 1151. The court imposed liability based on the policy of strict liability, not the corporate requirement of continuation of ownership. *Id.* at 1154. *But cf.* Weaver v. Nash Int'l, Inc., 730 F.2d 547, 548 (8th Cir. 1984)(applying Iowa law)(where there was no identity of stock or stockholders between purchasing and selling corporations, court refused to expand liability on basis of "continuity of business operation" theory since Iowa courts had not adopted it).

[56] *See supra* note 42 and accompanying text (discussion of mere continuation exception).

[57] *See supra* notes 53-54 and accompanying text.

[58] 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977).

[59] *Id.* at 25, 560 P.2d at 5, 136 Cal. Rptr. at 576.

the same model.[60] Since the court found no traditional exception applicable[61] and refused to follow the *Cyr* continuation expansion,[62] the *Ray* court held that successor liability did not depend on the technical manner of the asset transfer.[63] Instead, the court noted that the benefit given the successor by the assumption of the predecessor's product line warranted the equal assumption of the burden of liability for any injury caused by that product line.[64] Rather than rely on corporate framework in establishing the product-line approach, the *Ray* court totally abrogated the corporate basis and created an exception premised on the goals of products liability.[65]

---

[60] *Id.* The predecessor had sold its assets for cash and dissolved. *Id.* at 27, 560 P.2d at 6, 136 Cal. Rptr. at 577. The purchaser had acquired the equipment, inventory, plant, personnel, trade name, and goodwill of the seller. *Id.* Its sales representatives, who were prior employees of the predecessor, continued to do business with the predecessor's customers. *Id.* The employees were instructed not to reveal the change of ownership. *Id.* at 28, 560 P.2d at 7, 136 Cal. Rptr. at 578.

[61] *Id.* In California, the mere continuation exception required inadequate consideration and at least one person being a director, officer or shareholder in both the predecessor and the successor. Neither requirement was met in *Ray*. *Id.* at 29, 560 P.2d at 7, 136 Cal. Rptr. at 578. In California, the de facto merger exception required stock-for-asset transfer; the transaction in *Ray* was cash-for-asset. *Id.*

[62] *Id.* at 29-30, 560 P.2d at 8, 136 Cal. Rptr. at 579. The court rejected the *Cyr* expansion since *Cyr* did not put any emphasis on the inadequate consideration requirement. *Id.* Instead, the court in *Ray* borrowed the labor law successorship definition as applied in Golden State Bottling Co. v. NLRB, 414 U.S. 168, 182 n.5 (1973), and Howard Johnson Co. v. Hotel Employees, 417 U.S. 249, 257 (1974). *Ray*, 19 Cal. 3d at 30, 560 P.2d at 8, 136 Cal. Rptr. at 579. The justification given by the court was that *Golden State Bottling* and *Howard Johnson* were illustrative of labor collective bargaining cases in which the United States Supreme Court had not allowed the general law of successor liability to thwart the more important public policies of society. *Id.* The *Ray* court stated that, therefore, it would not allow the same general law to deter the importance of the policies behind products liability. *Id.*; *see supra* note 53 and accompanying text (*Cyr*'s use of successorship doctrine).

[63] *Ray*, 19 Cal. 3d at 30, 560 P.2d at 8, 136 Cal. Rptr. at 579. The court said that the policies which favored the continued protection of the injured consumer outweighed those corporate advantages advanced against successor liability. *Id.*

[64] *Id.* at 34, 560 P.2d at 10, 136 Cal. Rptr. at 581-82. *But see* Note, *Products Liability of Successor Corporations: A Policy Analysis*, 58 IND. L.J. 677, 689 n.79 (1983)(criticism of benefit/burden approach).

[65] *Ray*, 19 Cal. 3d at 30, 560 P.2d at 8-9, 136 Cal. Rptr. at 579. According to the court, since the predecessor had already dissolved, the plaintiff would be without remedy unless the successor were held liable. *Id.* at 28, 560 P.2d at 7, 136 Cal. Rptr. at 578. Because the successor had purchased not only the assets but the trade secrets, product designs and key employees, the successor was in the same position to spread the cost as was the predecessor. *Id.* at 30, 560 P.2d at 8-9, 136 Cal. Rptr. at 579. The court determined that it was fair to impose liability due to the benefit accrued to the successor from the taking over of the product line. *Id.*; *see* Note, *supra* note 37, at 876 (analysis of *Ray*'s

While *Cyr* expanded the continuation exception, and *Ray* created a new distinct exception, *Turner v. Bituminous Casualty Co.*[66] redefined and blended together two of the traditional exceptions — the de facto merger and the mere continuation.[67] In *Turner*, the plaintiff, having severed both his hands in a press manufactured by the predecessor, sued the successor under the de facto merger theory.[68] Since the corporate transfer had been a cash-for-asset transaction, this case did not fall within the de facto merger exception which requires a stock-for-asset transaction.[69] In stating that product liability policies would govern,[70] the *Turner* court reasoned that whether the form of payment was cash or stock was irrelevant in determining liability.[71] By dispens-

---

three criteria as pure products liability approach).

[66] 397 Mich. 406, 244 N.W.2d 873 (1976).

[67] The *Turner* approach has been called the continuity of enterprise exception to the traditional non-liability corporate rule. *See* Pelc v. Bendix Mach. Tool Corp., 111 Mich. App. 343, 353, 314 N.W.2d 614, 618 (1981)(court refused "continuity of enterprise" since only 8% of assets purchased). Several courts have adopted the continuity of enterprise theory. *See, e.g.*, Bonee v. L&M Constr. Chems., 518 F. Supp. 375, 383 (M.D. Tenn. 1981)(applying Ohio law)(imposed liability under continuity theory in chemical explosion); Holloway v. John E. Smith's Sons Co., 432 F. Supp. 454, 457 (D.S.C. 1977)(applying South Carolina law)(imposed liability under continuity theory for arm severed in meat-grinder); Rivers v. Stihl, Inc., 434 So. 2d 766, 773 (Ala. 1983)(liability imposed to American successor of foreign corporation); Andrews v. John E. Smith's Sons Co., 369 So. 2d 781, 785 (Ala. 1979)(court adopted continuity of enterprise theory where arm severed).

[68] *Turner*, 244 N.W.2d at 875. The predecessor corporation, Old Sheridan, sold its entire business, goodwill, name and assets for cash to the successor corporation, New Sheridan. *Id.* At the time of the purchase New Sheridan was a wholly-owned subsidiary of Harris Intertype Corporation and later merged with Harris. *Id.* at 876. The court stated that since the plaintiff had only the successor corporation to turn to for relief, distinctions between the types of corporate transfers were meaningless to the injured person. *Id.* at 878.

[69] *Id.* at 879. The plaintiff relied on Shannon v. Samuel Langston Co., 379 F. Supp. 797 (W.D. Mich. 1974), a de facto case, even though the transfer in *Turner* had been for cash. *Turner*, 244 N.W.2d at 879. This stock-for-asset factor was the only criteria missing from the traditional de facto merger requirements. *Id.* The court concluded that although the use of stock should be one of the factors in determining whether there exists an adequate nexus between the predecessor and the successor to impose liability, the stock requirement should not be controlling. *Id.* at 880; *see supra* note 41 (discussion of *Shannon*).

[70] *Turner*, 244 N.W.2d at 877.

[71] *Id.* The court said it made no sense to allow recovery where there was a statutory merger or a de facto merger and not allow recovery where the assets had been purchased for cash. *Id.* at 879-80. The court, citing *Ray*, stated that the issue at hand had nothing to do with the manner in which the ownership could be transferred, but rather whether the manufacturer who basically became the predecessor was liable for the defective products. *Id.* at 880.

ing with the de facto merger criteria of stock payment[72] and by adding the *Cyr* theory of successor representation[73] to the three remaining de facto merger criteria,[74] the *Turner* court created four specific factors with which to establish a prima facie case of continuity of enterprise.[75]

With the *Turner* analysis looking to the perpetuation of the corporate enterprise and the *Ray* analysis looking to the perpetuation of the product-line, the courts have been given two clear rationales with which to impose successor liability in a products injury claim. The New Jersey Supreme Court in *Ramirez v. Amsted Industries, Inc.*,[76] after reviewing both the *Turner*[77] and *Ray*[78] doctrines, adopted the *Ray*

---

[72] *Id.* at 883. The court disregarded the distinction between a stock-for-asset purchase and a cash-for-asset purchase in a products liability case. *Id.* at 879; *see supra* note 41 (de facto merger criteria).

[73] *Turner*, 244 N.W.2d at 882. The court relied on *Cyr* for guidance because *Cyr* had perceived the issue as one of tort, had relied on continuity and had recognized the products liability policy that the manufacturer is in the better position than the injured consumer to estimate the risk and bear the costs. *Id.* at 881. For a discussion of *Cyr*, see *supra* notes 47-55 and accompanying text. The *Turner* court noted that New Sheridan admitted in its brief that it was representing itself as a continuation of Old Sheridan. *Turner*, 244 N.W.2d at 882.

[74] The *Turner* court borrowed these de facto factors: the continuation of management, personnel, assets, and general business criteria; the seller corporation ceasing business and dissolving; and the purchaser corporation assuming the normal operating obligations and liabilities of the seller. *Turner*, 244 N.W.2d at 884.

[75] *Id.* at 883. The court acknowledged that the continuity of enterprise test would be applied in cash-for-assets purchase cases. *Id.* The first three elements of the continuity of enterprise test, *see supra* note 74, based as they are on corporate law, looked to the purchase agreement and the acquisition of the assets. The fourth element, *see supra* note 73, based on products liability policy, prevented the successor from exploiting and abusing the predecessor's goodwill without assuming the liability for its actions. *See generally* Note, *The Inconsistencies and Confusion of Successor Corporation Liability in Product Liability Claims: Should Iowa Adopt a New Approach?*, 34 DRAKE L. REV. 161, 174 (1985)(advocating adoption of continuity of enterprise approach).

[76] 86 N.J. 332, 431 A.2d 811 (1981). *See generally* Note, *The Product Line Theory of Corporate Successor Products Liability: An Evaluation After* Ramirez v. Amsted Indus., Inc., 35 RUTGERS L. REV. 389 (1983)(criticism of *Ramirez*'s three-part limitation of the *Ray* doctrine).

[77] *Ramirez*, 431 A.2d at 817-19 & n.3. Because the *Turner* approach relied on the traditional concepts of continuity, the *Ramirez* court felt its use would result in inconsistent decisions and refused to adopt the *Turner* approach. *Id.* at 819. *Compare* Hernandez v. Johnson Press Corp., 10 Ill. App. 3d 644, 388 N.E.2d 778, 780-82 (1978)(identical successor and acquisition as that in *Ramirez*, but successor held not liable) *with* Korzetz v. Amsted Indus., Inc., 472 F. Supp. 136, 143-44 (E.D. Mich. 1979)(same successor and acquisition as that in *Ramirez*, but successor held liable under *Turner* analysis).

[78] *Ramirez*, 431 A.2d at 819-20. The court stated that the *Ray* approach was more aptly based on the underlying policies of products liability because the *Ray* court had focused on the continuation of the manufacturing process and the product line. *Id.* at

product-line approach.[79] Efrain Ramirez, injured by the malfunction of a power punch press,[80] sued Amsted as the successor corporation to the manufacturer of the defective machine.[81] The court stated that the traditional rule with its narrow exceptions[82] should not govern in products liability cases.[83] By imposing liability on Amsted under the tort-law approach set forth in *Ray*,[84] the court based liability on the perpetuation of the manufacturing operation and product line of the predecessor[85] and not on the continuation of the corporate enterprise.[86] Though citing *Ray's* three policy considerations for imposing liability[87] and yet not incorporating them into its carefully worded holding, the *Ramirez* court chose to limit the *Ray* doctrine in three areas.[88] The

---

820.

[78] *Id.* at 819. In the companion case to *Ramirez*, Nieves v. Bruno Sherman Corp., 86 N.J. 361, 431 A.2d 826 (1981), the court extended liability to an intermediate successor corporation which had stopped manufacturing the specific defective product and was not manufacturing the same product line at the time of the injury. *Nieves*, 431 A.2d at 828. *But see* Bullington v. Union Tool Corp., 328 S.E.2d 726, 728 (Ga. 1985)(intermediate successor had neither manufactured nor sold injury-causing product, thus no liability imposed). *See generally* Note, *Intermediate and Successor Corporations Strict Liability Under Product Line Standard*, 12 SETON HALL L. REV. 327, 348 (1982)(criticism of *Ramirez* and *Nivens* decisions).

[80] *Ramirez*, 431 A.2d at 812.

[81] *Id.* at 813. Bontrager Construction Co. acquired all the assets of the original manufacturer, Johnson Machine & Press Co., in a stock-for-stock transfer. *Id.* at 814. Bontrager continued to manufacture the Johnson product line. *Id.* In 1962, Amsted purchased for cash all of Bontrager's assets, consisting mainly of Bontrager's manufacturing facility and the right to use Johnson's trade name. *Id.*

[82] *Id.* at 816. If the court had applied the traditional rule, Amsted would have incurred no liability since there was no express assumption of contingent liabilities. *Id.* There was no de facto merger because the payment was cash, not stock. *Id.* No continuation of the predecessor through continuity of management, ownership, or personnel was present. *Id.* There appeared no evidence of inadequate consideration or fraud. *Id.*

[83] *Id.*

[84] *Id.* at 820. The court applied the *Ray* criteria to the *Ramirez* facts. *Id; see supra* note 65 (discussion of *Ray* criteria). The court concluded that Amsted's purchase of Johnson's assets precluded any remedy against the original manufacturer by the plaintiff. *Ramirez*, 431 A.2d at 820. Although there was an intermediate transaction, the court focused on the fact that the Johnson product was manufactured throughout the two transactions. Therefore, the court held Amsted liable based on a benefit versus burden analysis. *Id.*

[85] *Ramirez*, 431 A.2d at 820.

[86] *See supra* note 75 and accompanying text (continuity of enterprise under *Turner*).

[87] *Ramirez*, 431 A.2d at 820; *see supra* note 65 (*Ray* criteria discussion).

[88] *Ramirez*, 431 A.2d at 825; *see* Note, *supra* note 76, at 409 (limiting of *Ray* exception by *Ramirez* court).

court required that both the predecessor and the successor be corporate entities.[89] Secondly, the successor must acquire substantially all of the seller's assets.[90] Finally, the successor must undertake essentially the same manufacturing operation, including the production of the injury-causing product line.[91] These three specific limitations on the *Ray* holding by the *Rameriz* court narrowed the scope of the product-line exception.

Although the Pennsylvania Supreme Court has not addressed this issue, the Superior Court of Pennsylvania in *Dawejko v. Jorgensen Steel Co.*[92] adopted the *Ramirez* version[93] of the product-line exception.[94] The Pennsylvania court, noting the specific change in wording in the *Rameriz* holding from that used in the *Ray* holding, acknowledged that this flexibility in the statement of the general rule would

---

[89] *Ramirez*, 431 A.2d at 825. The court gave special recognition to the form of the entity by limiting its holding to only corporations. *Id.* Since recent cases have held that the selling entity does not have to be a corporation for the buying corporation to be liable for product defects, the *Ramirez* limitation has already been eroded. *See, e.g.* Rawlings v. D. M. Oliver, Inc., 97 Cal. App. 3d 890, 159 Cal. Rptr. 119 (1979)(successor held liable when predecessor was sole proprietorship).

[90] *Ramirez*, 431 A.2d at 825. The court in adopting the product-line approach emphasized the continuation of the manufacturing assets rather than the continuation of the corporate assets. *Id.* The court focused on the successor as a member of the enterprise responsible for the injury-causing product and not as a continuation of the corporate entity. *Id.* at 819.

[91] *Id.* at 825. The court made clear that liability would not accrue to the successor unless he essentially undertook the predecessor's manufacturing and also manufactured the same injury-causing product. *Id. See generally* Note, *Continued Expansion of Corporate Successor Liability in the Products Liability Arena:* Ramirez v. Amsted Indus., Inc., 58 CHI-KENT L. REV. 1117, 1135-50 (1982)(strong approval of validity of *Ramirez*).

[92] 290 Pa. Super. 15, 434 A.2d 106 (1981).

[93] *Dawejko*, 434 A.2d at 111; *see supra* notes 88-91 and accompanying text (*Ramirez* holding).

[94] *Dawejko*, 434 A.2d at 111; *see supra* notes 84-91 (*Ramirez* development of *Ray*'s three-part test product-line doctrine liability).

Several federal courts in applying Pennsylvania law have held that the Pennsylvania Supreme Court would adopt the product-line exception. *See* Wright v. Federal Mach. Co., 535 F. Supp. 645, 650 (E.D. Pa. 1982)(liability not imposed); Savini v. Kent Mach. Works, Inc., 525 F. Supp. 711, 718 (E.D. Pa. 1981)(part three of product-line test not met); Jacobs v. Lakewood Aircraft Serv., 512 F. Supp. 176, 183 (E.D. Pa. 1981)(no liability due to successor's use of new facilities, new employees, and officers).

However, other federal courts have refused to adopt the product-line exception in the absence of precedential authority from that state's highest court. *See* Tucker v. Paxson Mach. Co., 645 F.2d 620, 624-25 (8th Cir. 1981)(applied Missouri law in rejecting product-line approach); Rhynes v. Branick Mfg. Corp., 629 F.2d 409, 410 (5th Cir. 1980)(rejected product-line theory applying Texas law); Leannais v. Cincinnati, Inc., 565 F.2d 437, 441 (7th Cir. 1977)(applied Wisconsin law in rejecting product-line approach).

allow the court to determine on a case-by-case basis whether the successor should be liable.[95] In *Dawejko*, the court affirmed the successor corporation's liability[96] for the injury caused when the plaintiff was hit by sheets of steel dropped from a lifting machine manufactured by its predecessor.[97] To formulate its test, the *Dawejko* court selected criteria from several prior successor corporation products liability cases.[98] From *Ramirez*, the court required that all or substantially all of the manufacturing assets be acquired.[99] From *Cyr*, the successor must have held itself out as an ongoing enterprise.[100] The third criteria, taken from *Turner*, required that the successor maintain the same name, personnel, property, and clients as its predecessor.[101] The fourth factor, that the successor acquire the name and goodwill of the predecessor, who must have quickly dissolved, was also borrowed.[102] The final factor, was that the *Ray* three-part test be met.[103] However, in the same manner as the *Ramirez* court, the *Dawejko* court did not incorporate these factors into its holding.[104] *Dawejko* borrowed criteria from cases expanding the exceptions to the traditional rule and from cases apply-

---

[95] *Dawejko*, 434 A.2d at 111. The court stated that since the impetus for their adoption of a new rule was the underlying tort-based policies of products liability, the loosely phrased rule could be implemented more easily. *Id.*

[96] *Id.* at 107.

[97] *Id.* The lifting machine, called a Mansaver, was manufactured in 1957 by Mansaver Industries, Inc., and sold to Hotpack Corporation, Dawejko's employer. *Id.* In 1964, American Chain and Cable Company, also known as ACCO, bought the assets of Mansaver Industries, including the corporation's trademark and goodwill. *Id.* ACCO continued to sell the injury-causing product under the same name as its predecessor. *Id.* Mansaver Industries, subsequent to the sale, ceased operation and ACCO created a subdivision called Mansaver Industries, Inc. *Id.*

[98] *Id.* at 111.

[99] *Id.*; *Ramirez*, 431 A.2d at 825; *see supra* notes 76-91 and accompanying text.

[100] *Dawejko*, 434 A.2d at 111; *Cyr*, 504 F.2d at 1153; *see supra* notes 47-57 and accompanying text.

[101] *Dawejko*, 434 A.2d at 111; *Turner*, 244 N.W.2d at 883; *see supra* notes 66-75 and accompanying text.

[102] *Dawejko*, 290 Pa. Super. at 26, 434 A.2d at 111; Knapp v. North Am. Rockwell Corp., 506 F.2d 361, 367 (3d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975); *see supra* note 41.

[103] *Dawejko*, 434 A.2d at 111; *Ray*, 19 Cal. 3d at 31, 560 P.2d at 8-9, 136 Cal. Rptr. at 579-80; *see supra* notes 58-65 and accompanying text.

[104] *Dawejko*, 434 A.2d at 111; *see Ramirez*, 431 A.2d at 825 (*Ramirez* court's explanation of why criteria it set forth was not included in its holding). The court in *Dawejko* stated that since its adoption of the product-line doctrine was based on tort theory, the court would use the product-line analysis only for products liability injury cases. *Dawejko*, 434 A.2d at 111. The court then stated that the *Ramirez* rule was appropriate for its adoption. *Id.*

ing the new product-line exception, but the court did not give any indication whether some or all of the factors must be present or whether all the factors should be weighted equally.[105] As a result, the cases in Pennsylvania after *Dawejko* have been inconsistent.[106]

In the instant case the court reasoned that since the successor corporation was created by the predecessor corporation for the purpose of transferring the predecessor's assets to the successor[107] and since the stockholders of the predecessor corporation were also the stockholders of the successor corporation,[108] the criteria for the mere continuation exception to the traditional rule had been met.[109] The old corporation's management had remained as a part of the management of the successor corporation and the assets transferred from the predecessor to the successor had been simply an exchange of stock, thus the successor corporation was in the same position as the predecessor with respect to the knowledge of and the responsibility for products liability claims.[110] Also, the court noted that since the continuity of enterprise theory and the product-line theory overlap, it was not error for the lower court to choose the continuity of enterprise approach as a less radical departure from the traditional approach.[111] Finding that sufficient evidence for the product liability claim was presented by the plaintiff under all three liability theories and acknowledging that the proper determination of this evidence was the domain of the jury, the court then held that the verdict of the jury should be reinstated.[112]

Whereas the traditional rule of non-liability was created for the

---

[105] *Dawejko*, 434 A.2d at 111.

[106] *See* Note, *supra* note 75, at 181 (discussion of inconsistencies in Pennsylvania cases post-*Dawejko*). *Compare* Amader v. Pittsburgh Corning Corp., 546 F. Supp. 1033, 1035-37 (E.D. Pa. 1982)(broad interpretation of *Dawejko*) *with* Savini v. Kent Mach. Works, Inc., 525 F. Supp. 711, 719-21 (E.D. Pa. 1981)(narrow interpretation of *Dawejko*).

[107] *Mozingo*, 752 F.2d at 173; *see supra* note 5.

[108] *Mozingo*, 752 F.2d at 176. The court, however, stated that even though Mr. Way was a stockholder and officer of both corporations, it would be unjust to hold him personally liable for his fringe involvement with the corporation. *Id.* at 174; *see supra* note 7 (discussion of Mr. Way's personal liability).

[109] *Mozingo*, 752 F.2d at 176. The two traditional criteria for the mere continuation exception were not met exactly; however, the court applied the continuity of enterprise theory which it determined was simply an expansion of the continuation theory, and therefore was sufficient for the continuation exception. *Id.* at 175; *see supra* notes 42, 72-75 and accompanying text (mere continuation and continuity of enterprise discussions).

[110] *Mozingo*, 752 F.2d at 176.

[111] *Id.* at 175. The court stated the two theories overlapped by taking into consideration the continuity of product line. *Id.* The district court properly instructed the jury on the continuity of enterprise theory as announced in *Cyr. Id.* at 175-76.

[112] *Id.* at 178.

protection of the corporate creditors and stockholders,[113] its application in a products injury claim usually thwarts the innocent consumer's recovery.[114] The determinate criteria for successor liability under the traditional rule is the form of the asset transfer.[115] Therefore, corporate lawyers, accountants, and tax advisors tend to manipulate the modes of transferring assets from one corporation to another in an effort to avoid fitting into one of the exceptions, and thereby successfully transferring no liability.[116]

Of course, alienability of businesses is desirable in an economic aspect; however, when a court is faced with an innocent consumer, injured by the defective product of a corporate manufacturer, it is the court's duty to balance the equities of the situation.[117] The inequity of this dependence on the form of the asset transfer over the substance of the asset transfer has led courts like the *Mozingo* court[118] to extend the traditional exceptions when faced with a product liability claim.[119] The expansion of the mere continuation exception will allow the courts to determine successor liability based on valid criteria which draws from both corporate and tort law.[120] In applying the continuity of enterprise criteria, the courts, by looking beyond the mere form of the transfer to the totality of the circumstances surrounding the transfer,[121] gain more credible information and greater discretion in the weighting of these factors.[122]

Recent case law illustrates that there are less inconsistent decisions when the continuity of enterprise exception is applied than when the traditional or product-line approaches are used.[123] The corporate structure is such that its creditors and stockholders can be protected in other ways; for example, future business transactions can properly prepare for any contingent liabilities by insurance, trust funds, indemnity agreements, or contribution agreements. The maintenance and funding of these remedies may be allocated to either party, both parties, the industry, or based on a share-of-the-market theory. Few corporations

---

[113] *See supra* note 37 and accompanying text.

[114] *Id.*

[115] *Id.*

[116] *See supra* notes 40-43 and accompanying text.

[117] *See supra* notes 24, 71.

[118] *Mozingo*, 752 F.2d at 175.

[119] *See supra* notes 41, 55, 62, 66 and accompanying text.

[120] *See supra* note 75 and accompanying text.

[121] *See supra* notes 66-73 and accompanying text (discussion of *Turner*'s continuity of enterprise).

[122] *See supra* note 75 and accompanying text.

[123] *See* Note, *supra* note 75, at 161-62.

are without lobbying strength, and thus enactment of legislative statutes of repose or state/federal trust funds are equally available.[124] However, the individual consumer does not have all these alternatives; in reality, he has available to him only the judicial system.

The continuity of enterprise exception allows the court to balance the interests of innocent injured consumers, the business expectations of manufacturers, society's inherent protection of human life and health, and society's sense of fairness and appreciation for the work ethic. This approach seems to be a more equitable consideration when balancing the rights and expectations of all concerned — the consumer, the manufacturer, and society.

Noel Victoria Holladay

[124] *See generally* Note, *supra* note 64, at 687.

DARBY

THE "FIRST" COMPANY

- FIRST to use offset printing
- FIRST to use photo composition
- FIRST to use computers for galley correction accuracy
- FIRST and only to have "Accu-Type" composition—It's fantastic!
- FIRST to use perfect binding
- FIRST and only to provide editor's day at printer's plant
- FIRST and only to use web offset for law review printing

Being "FIRST" has helped us be the "BEST"—The best service, quality & price in America. Being "BEST" has helped us become number "ONE"—The largest printer of college law reviews in the world. If you want the "BEST" give the "FIRST" company a call—Darby Printing Company.

"FIRST"
IN
QUALITY—SERVICE—PRICE

Darby Printing Company • 715 W. Whitehall St., S.W. • Atlanta, Georgia 30310
Telephone (404) 755-4521 — (800) 241-5292

YOUR FIRST MOVE, WHEN PREPARING A CASE, CAN BE YOUR WINNING SECRET!

INTRODUCING...

PREPARING FOR SETTLEMENT AND TRIAL

PST

The secret is out. PREPARING FOR SETTLEMENT AND TRIAL (PST) provides a series of articles designed as an all inclusive single source for expert case preparation.

From the initial client interview to the decision for settlement or trial, the innovative format of PST and its unique, comprehensive coverage significantly reduces your research time.

Both Plaintiff and Defendant sides of the case are analyzed in each article giving you fast access to the comprehensive, complete information you need. By applying the procedures and techniques revealed in each article to the particular facts of your case, you establish a solid foundation for a successful resolution.

The more thoroughly prepared you are, the greater your chances for an advantageous settlement. Prepare yourself with PST, a practical, thorough, authoritative guide that covers:

- all relevant client information needed
- the complaint
- the answer
- discovery
- limitations
- interrogatories
- localized case law
- localized statutory law
- and all the critical facts and information you need to know to increase your chances for success in a settlement or trial.

It's no secret. PREPARING FOR SETTLEMENT AND TRIAL should be your first move when preparing your next case.

SHEPARD'S McGRAW-HILL

For more information about PREPARING FOR SETTLEMENT AND TRIAL call TOLL-FREE: 800-525-2474
8 a.m.-5 p.m. mtn. time
(In Colorado, call COLLECT: 577-7707)

Shepard's/McGraw-Hill
P.O. Box 1235
Colorado Springs,
Colorado 80901

"FULL TEXT PLUS" MAGIC

MEANS MORE ACCURACY IN LEGAL RESEARCH

Full Text Plus™ gives you a lot more than the extra case-finding power of synopses and headnotes. Like magic, WESTLAW's Full Text Plus also makes your research more accurate.

Before a Full Text Plus case goes into WESTLAW, our manuscript verifiers check and correct any citation errors in the opinion.

In fact, every year West finds and corrects 75,000 citation errors occurring in slip opinions. Additionally, West editors verify the names of parties, judges and attorneys, as well as citations to statutes, codes, rules and regulations. The benefit to you is accuracy and reliability in legal research.

Only with WESTLAW can you rely on the accuracy of on-line materials. For more information on WESTLAW magic, call us today at 1-800-328-0109 (or 612/228-2450). We will send you the WESTLAW magic brochure or other information you request.

WESTLAW®

Superiority That's No Illusion

© 1985 West Publishing Company

MISSISSIPPI ATTORNEY'S DESK BOOK

The one book every Mississippi Attorney needs! What does the *Desk Book* include?—Rules of all Mississippi Courts: Mississippi Supreme Court, Chancery Court, Circuit Court, County Court and the Local Rules of these Courts. In addition, the *Desk Book* contains Federal Rules of Appellate Procedure, Local Rules of the Fifth Circuit, and the Uniform Local Rules of the Northern and Southern Districts of Mississippi. Furthermore, all nonbusiness days of county courthouses are noted.

The *Desk Book* comes in notebook format for easy inclusion of the supplements provided three times annually.

The *Desk Book* can be purchased for $30.00. Supplements for one year are $18.00

Mississippi Law Journal
P. O. Box 849
University, Mississippi 38677

We earn
your trust every day.

Trustmark™
National Bank

Canton / Clinton / Columbia / Georgetown / Gloster / Greenville
Greenwood / Hattiesburg / Hazlehurst / Jackson / Leland / Liberty
Madison / Magee / McComb / Pearl / Petal / Ridgeland
Tylertown / Wesson

Member FDIC